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RECORD, CASE No. 13,787.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 195.

A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, JOSEPH NATHAN, JOHN SCHREINER, FRED. J. MILLER, AND A. A. BOCK, PLAINTIFFS IN ERROR,

vs.

THE CROOKE MINING AND SMELTING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED OCTOBER 16, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1892.

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a *Writ of Error to the Supreme Court of Colorado.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, }
State of Colorado, } *ss.*:

The President of the United States to the judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, between A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, & A. A. Bock and The Crooke Mining & Smelting Company, and because in the record and proceedings, and also in the rendition of the judgment of a plea which is between the said parties in the said supreme court of Colorado, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, wherein a title to a certain lode mining claim known as the Monitor mine was claimed by the persons hereinabove first named as being owned by & belonging to them under a statute of the United States, & the decision of the said supreme court of Colorado was against the said title so claimed as aforesaid and specially set up & urged to be protected under & by virtue of the terms & provisions of the said statute of the United States, *and* a manifest error hath happened, to the great damage of the said A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, & A. A. Bock, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 14th day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 31st day of August, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 114th year.

Seal United States Circuit Court, District of Colorado.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Allowed by—
——— ———, *Judge*.

Fees of clerk U. S. circuit court paid, $2.00.

J. W. MILLS.

b [Endorsed:] Gen. No. 1255. Supreme court of the State of Colorado. A. R. Bushnell *et al.*, plaintiffs in error, *vs.* The Crooke M. & S. Co. Writ of error to supreme court, State of Colorado. Filed in supreme court of Colorado this 31st day of Aug., 1889. James A. Miller, —, by —— ——, deputy. J. Warner Mills, attorney for plaintiff- in —.

Return.

THE UNITED STATES OF AMERICA, }
State of Colorado, } *ss:*

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said supreme court, at Denver, in said State, this 20th day of September, 1889.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER, *Clerk,*
By —— ——, *Deputy Clerk.*

c THE UNITED STATES OF AMERICA, }
State of Colorado, } *ss:*

Pleas before the honorable the supreme court of Colorado at a regular term thereof begun and held at Denver, the capital of said State, on the second Tuesday (it being the second day) of April, A. D. one thousand eight hundred and eighty-nine.

Present: Honorable Joseph C. Helm, chief justice; Honorable Victor A. Elliott and Honorable Charles D. Hayt, justices; Albert Weber, Esq., sheriff of Arapahoe county, by Felix A. Richardson, bailiff, and James A. Miller, clerk.

d Be it remembered that heretofore, to wit, the 30th day of November, A. D. 1883, came the appellants, by J. Warren Mills, Esq., their attorney, and filed in the office of the clerk of said supreme court a duly certified transcript of the record and proceedings of a certain cause upon appeal from a judgment of the district court of Hinsdale county entered in said cause, wherein The Crooke Mining and Smelting Company was plaintiff and A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock were defendants, and which said transcript is in words and figures as follows, to wit:

1 UNITED STATES OF AMERICA.

STATE OF COLORADO, } ss:
Hinsdale County, }

In District Court, December Term, A. D. 1882.

Pleas before the Honorable Columbus W. Burris, judge of the district court of the seventh judicial district of the State of Colorado and sole presiding judge of the district court of Hinsdale county, in the State aforesaid, and at a term thereof begun and held at the court-house, in the town of Lake City, in said county, on the first Monday (being the fourth day) of December, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the said United States the one hundred and seventh.

Present: Honorable Columbus W. Burris, judge of the seventh judicial district of the State of Colorado; F. C. Goudy, district attorney; Clair Smith, Sheriff.

Attest: E. D. BOUTON, *Clerk.*

2 STATE OF COLORADO, } ss:
County of Hinsdale, }

In the District Court of the Fourth Judicial District in and for said County.

THE CROOKE MINING AND SMELTING COMPANY, Plaintiff,
vs.
A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, Defendants. } Complaint.

The plaintiff complains and alleges—

1. That it is a corporation organized under and by virtue of the laws of the State of New York, and that it has filed in the office of the secretary of the State of Colorado and in the office of the clerk and recorder of the said county of Hinsdale copies of the articles of incorporation of the said company duly and regularly certified by the officer authorized so to do under the laws of the State of New York, and that it has further and in every respect complied with the laws of the State of Colorado relative to foreign corporations to enable the same to do business in this State.

2. That on the 12 day of October, A. D. 1878, and ever since hitherto it was and is the owner and in actual occupation of the Annie Lode mining claim, 1,500 feet in length and 300 feet in width, situate in the Galena mining district, in the county and State aforesaid.

3 3. That it claims the right to occupy and possess said premises by virtue of the purchase and conveyance of the same from George L. Doherty, who had purchased and received a con-

veyance of the same from Joseph R. Simons, who had previously purchased and received a conveyance of the same from John Doherty, the said John Doherty being the original discoverer and locator of the said Annie lode and mining claim, and who acquired the right to occupy and possess the same by virtue of discovery and by locating said claim, first, by sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface and the showing of a well-defined crevice at the bottom thereof; second, by posting at the point of discovery on the surface a plain sign or notice containing the name of said lode, the name of said locator, and the date of said discovery; third, by marking the surface boundary of the claim by six substantial posts, marked on the sides which were toward the claim and sunk in the ground, to wit, one at each corner and one at the centre of each side line, and afterwards and within three months from the discovery of said claim by filing for record in the office of the recorder of said Hinsdale county a location certificate containing the name of the lode, the name of the locator, the date of location, the number of feet in length claimed on each side of the centre of the discovery shaft, and the general course of the said lode.

4. That on the first day of September, A. D. 1879, the de-
4 fendants wrongfully entered upon parcel of said claim, to wit, all that part of said claim which is intersected by the exterior lines of survey lot No. 282, known as the Monitor Lode mining claim, as shown by plat, marked Exhibit "B," filed in the land office of the United States at Lake City, in said State, with the adverse claim of said plaintiff against the entry of said survey lot for patent, such ground so intersected being described as follows: Beginning at the northwest corner (it being corner No. 5) of the said Monitor claim, running thence south 13° 25′ west 341.5 feet, thence south 60° 27′ west 408.5 feet, thence south 48° 08′ west 463.5 feet, thence south 34° 20′ west 99.6 feet, thence south 55° 40′ east 112.8 feet to the west side line of the Ute lode (being survey plat No. 147*a*), thence north 51° 35′ east 91.6 feet to corner No. 9 of said Ute lode, thence north 69° 10′ east 237 feet to corner No. 8 of said Ute lode, thence north 68° 56′ east 40.8 feet, thence north 34° 20′ east 887.1 feet to the northeast end line of the said Monitor claim, thence north 41° 31′ west 135.1 feet to the place of beginning, and that defendants both ever since hitherto wrongfully withheld the possession of said parcel of said Annie lode and mining claim from the plaintiff, to his damage in the sum of five hundred dollars.

5. That this suit is brought in support of said adverse claim, and that plaintiff necessarily disbursed, expended, and paid out the sum of 300 dollars for plats, abstracts, and copies of papers filed in said land office with his said adverse claim, and also a reasonable
5 counsel fee, to wit, seventy-five dollars, for the expense of preparing said adverse claim.

Wherefore plaintiff prays judgment against the defendants—

1. For the recovery of the possession of said parcel of said Annie Lode mining claim.

2. For the sum of $500 damages.

3. For the sum of $300 expended in preparing said adverse claim.
4. For costs of suit and other relief.

THE CROOK MINING AND
SMELTING COMPANY,
By M. B. GERRY, *Its Attorney.*

Endorsed as follows:

1. No. 215. District court. The Crooke Mining and Smelting Company *vs.* A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock. Complaint. Ejectment. Filed Jan'y 10, '80. E. D. Bouton, clerk. M. B. Gerry, plaintiff's attorney.

6 STATE OF COLORADO, } ss:
County of Hinsdale, }

In the District Court of the Fourth Judicial District in and for said County.

THE CROOKE MINING AND SMELTING COMPANY, Plaintiff,
vs.
A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, JOSEPH Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, Defendants.

I do hereby enter myself security for costs in this case and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, pursuant to the laws of this State.

Dated this 8 day of January, A. D. 1880.

JOHN J. CROOKE.

Endorsed as follows:

2. 215. District court. The Crooke Mining and Smelting Company *vs.* A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock. Security for costs. Approved and filed Jan'y 10, '80. E. D. Couton, clerk.

6½ STATE OF COLORADO, } ss:
Hinsdale County, }

In the District Court of said County, in the Fourth Judicial District of Colorado.

THE CROOKE MINING AND SMELTING COMPANY, Plaintiff,
vs.
A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, JOSEPH Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, Defendants.

The people of the State of Colorado send greeting to A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, & A. A. Bock, defendants above named:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court in and for

the county of Hinsdale, in the fourth judicial district of the State of Colorado, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or, if served out of this county but within this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover the possession of
7 a certain parcel of the lode or mining claim known as the "Annie Lode mining claim," for the sum of five hundred dollars damages and three hundred dollars expended in preparing adverse claim, with costs of suit & other relief particularly described in the complaint on file herein; also for interest thereon at the rate of ten per cent. per annum.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded in the said complaint.

Given under my hand and the seal of the district court
[SEAL.] of said Hinsdale county, at Lake City, in said county, this 21st day of Jan'y, A. D. 1880.

E. D. BOUTON,
Clerk of District Court.

Endorsed as follows:

STATE OF COLORADO, }
Hinsdale County, } *ss:*

I hereby certify that after having made due and diligent search I have not been able to find the within-named defendants or either of them, A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, in my county, and I therefore make return this 9th day of February, A. D. 1880.

E. N. CAMPBELL,
Sheriff of Hinsdale County.

8 Further endorsed as follows:

3. 215. Original. Docket No. 215. District court. Summons. The Crooke Mining & Smelting Company, plaintiff, *vs.* A. R. Bushnell *et al.*, defendants. State of Colorado, Hinsdale county, *ss:* Office of the sheriff of said county. I hereby certify that I received the within summons on the 21st day of January, A. D. 1880. E. N. Campbell, sheriff.

Sheriff's fees:

Service and return	$75
Mileage	20
Total	$95

M. B. Gerry, plaintiff's attorney. Filed Feb'y 9th, A. D. 1882. E. D. Bouton, clerk.

9 In the District Court of the Fourth Judicial District in and for Hinsdale County, State of Colorado.

THE CROOKE MINING AND SMELTING COMPANY, Plaintiff,
against
A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, JOSEPH Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, Defendants.

HINSDALE COUNTY, *ss:*

John J. Crooke, of Lake City, in Hinsdale county, being duly sworn, deposes and says:

1st. That he is the duly authorized agent of The Crooke Mining & Smelting Company, a corporation duly organized under and by virtue of the laws of the State of New York, and that said corporation has complied with all and singular the laws of the State of Colorado relative to foreign corporations to enable it to do business in this State, the plaintiff in the above-entitled suit.

2nd. That the complaint in said action has been duly filed with the clerk of this court and summons thereupon issued, and that said action is brought for the purpose of recovering from the defendants above named and each of them the possession and right of occupation of a certain portion or parcel of the "Annie Lode mining claim," situate in Galena mining district, in said
10 county of Hinsdale, which said Annie lode and mining claim the said plaintiff claims, owns, and *are* entitled to possess by right of purchase from the original locators thereof and by virtue of a full compliance with the laws of the State of Colorado and of the statutes of the United States relating to mineral lands by said plaintiff and its grantors, which said portion or parcel is wrongfully and unlawfully claimed and occupied by the defendants and each and all of them adversely to the rights of plaintiff as a part and parcel of the Monitor lode and mining claim.

3rd. That a summons was duly issued out of this court to the sheriff of Hinsdale county, with directions to said sheriff to serve the same upon the defendants therein named, and that said sheriff has returned the same to the clerk of this court with his return thereon endorsed and certified to the effect that after having made due and diligent search he was not able to find the defendants, A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, or A. A. Bock, or either of them, and therefore made return of said summons without service on said defendants.

4th. That I have fully and fairly stated the facts of the case to M. B. Gerry, of Lake City, in the county and State aforesaid, the counsel for the plaintiff in this suit, and I am by him advised and verily believe that the plaintiff has a good cause of action in this suit against the defendants above named and each of them, and that said defendants, A. R. Bushnell, John G. Clark, Adolph
11 Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and

A. A. Bock, and each of them are necessary and proper partly defendant is said suit.

5th. And deponent further says that the said A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock are not residents of the State of Colorado, but reside, as deponent is informed and believes, in the State of Wisconsin.

6th. That personal service of said summons cannot be made on the said defendants; wherefore plaintiff demands an order that service of the same may be made by publication.

JOHN J. CROOKE.

STATE OF COLORADO, } ss:
County of Hinsdale, }

Subscribed and sworn to before me this 28th day of February, A. D. 1880.

[Seal J. C. Bell, Notary Public, Hinsdale Co., Colo.]

J. C. BELL,
Notary Public.

Endorsed as follows:

4. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Affidavit Jno. J. Crooke for publication of summons. Filed Feb'y 28, '80. E. D. Bouton, clerk.

And afterward, on the same day, being in vacation succeeding the regular December term of said court, A. D. 1879, the following order was made and entered of record:

12 STATE OF COLORADO, }
County of Hinsdale. }

In the District Court of the Fourth Judicial District of the State of Colorado in and for the County of Hinsdale.

THE CROOKE MINING AND SMELTING COMPANY, Plaintiff, }
vs.
A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, Defendants. } No. 215.

Upon reading and filing the affidavit of John J. Crooke, and it satisfactorily appearing therefrom to me, the clerk of the district court of the fourth judicial district of the State of Colorado in and for the county of Hinsdale, that the said defendants reside out of this State and cannot, after due diligence, be found therein, and it appearing from the affidavit aforesaid that a cause of action exists in this action in favor of the plaintiff therein and against the said defendants, and that the said defendants are necessary and proper parties defendant thereto, and it further appearing that a summons has been duly issued out of said court in this action, and that personal service of the same cannot be made upon the said defendants

for the reasons hereinbefore contained and by the said affi-
13 davit made to appear, on motion of M. B. Gerry, Esq., attorney for the plaintiff, it is ordered that the service of summons in this action be made upon the said defendants by publication thereof in the "Silver World," a newspaper published at Lake City, hereby designated as the newspaper most likely to give notice to the said defendants; that such publication be made at least once a week for four successive weeks.

E. D. BOUTON,
Clerk of the District Court of the Fourth Judicial District of the State of Colorado in and for the County of Hinsdale.

Dated this 28th day of February, A. D. 1880.

14 STATE OF COLORADO, } ss:
Hinsdale County, }

In the District Court.

THE CROOKE MINING AND SMELTING COMPANY, Plaintiff, }
vs.
A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, JOSEPH Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, Defendants. }

"Annie adverse."

And now come the defendants herein, by their attorney, J. W. Mills, and expressly limiting their appearance for the purpose of this motion only, move this court to quash the summons herein and set aside the service of the same for the reasons following, to wit:

1st. Because the summons published in this case does not contain the name of plaintiff's attorney, as required by law.

2nd. Because it appears from the affidavit for publication of summons filed herein that the residence of the defendants is known, & that they are non-residents, & that no summons was deposited or ordered to be deposited forthwith in the post office, directed to said defendants or any of them at their place of residence.

3rd. Because if the place of residence of the defendants herein is not fully set forth as being known in the said affidavit for the publication of summons, said affidavit is then fatally defective
15 in failing to show that by due diligence & reasonable enquiry such residence could not be correctly ascertained.

4th. Because it does not appear by the sheriff's return of summons herein that the defendants in this cause (or at least some of them) could not be found in this county.

5th. Because there is no order or sufficient order made in this case by the clerk of this court to authorize publication of summons herein.

6th. Because the law has not been fully met which authorizes service of summons to be made by publication.

7th. Because of other good and sufficient reasons that will readily appear to this court.

A. R. BUSHNEL ET AL.,*Def'ts,*
By J. W. MILLS, *Their Att'y.*

Endorsed as follows:

5. 215. Crooke M'g & Smelting Co. *vs.* A. R. Bushnell *et al.* In the district court. Motion to quash summons and set aside service. Annie adverse. Filed this 28th day of May, A. D. 1880. E. D. Bouton, clerk.

16 STATE OF COLORADO, } *ss:*
County of Hinsdale, }

I, Wm. Penn Harbottle, of said county of Hinsdale, do hereby certify that I am principal clerk to Henry C. Olney, publisher and proprietor of the Silver World, a weekly newspaper printed and published at Lake City, in said county and State; and I further certify that the notice, of which the annexed is a true copy, has been published in said newspaper for four successive weeks and four times, and that the first publication of said notice was in said paper bearing date the third day of April, A. D. 1880, and the last publication of said notice was in said paper bearing date the twenty-fourth day of April, A. D. 1880.

In witness whereof I have hereunto set my hand this eighth day of August, A. D. 1880.

WM. PENN HARBOTTLE.

Code Summons.

STATE OF COLORADO, } *ss:*
Hinsdale County, }

In the District Court of said County, in the Fourth Judicial District of Colorado.

THE CROOKE MINING & SMELTING COMPANY, Plaintiff,
vs.
A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, JOSEPH Nathan, John Schreiner, Fred. J. Mills, and A. A. Bock, Defendants.

17 The People of the State of Colorado send greeting to A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Mills, and A. A. Bock, defendants above named:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court in and for the county of Hinsdale, in the fourth judicial district of the State of Colorado, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or, if served out of this county but in this district, within twenty days; otherwise within forty

STATE OF COLORADO, *ss:*

...udgment by default will be taken against you according to ...ayer of said complaint. The said action is brought to recover ...possession of a certain parcel of the lode mining claim known ... the Annie Lode mining claim for the sum of five hundred dollars damages and three hundred dollars expended in preparing adverse claim, with costs of suit and other relief, particularly described in the complaint on file herein; also for interest thereon at the rate of ten per cent. per annum.

And you are hereby notified that if you fail to appear and answer the said complaint as above required the said plaintiff will apply to the court for the relief demanded in the said complaint.

Given under my hand and the seal of the district court of
18 said Hinsdale county, at Lake City, in said county, this 28th day of February, A. D. 1880.

[SEAL.] E. D. BOUTON,
Clerk of District Court.

Endorsed as follows:

6. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Certificate of publication. Filed Aug. 11, '80. E. D. Bouton, clerk.

And afterward, on the 14th day of August, A. D. 1880, being the sixth day of the regular August term of said court, the following order was made and entered of record:

THE CROOKE MINING & SMELTING CO.
vs.
A. R. BUSHNELL *et al.* } No. 215.

This cause coming on to be heard upon the motion of defendants to set aside the plaintiff's service of summons herein by publication and to quash the summons in this action, after argument of counsel and being fully advised in the premises the court doth sustain the said motion to set aside service of summons by publication and doth overrule said motion to quash the summons herein. It is therefore ordered that the service of summons by publication as aforesaid be, and is hereby, set aside.

19 STATE OF COLORADO, } *ss:*
County of Hinsdale, }

In the District Court of the Fourth Judicial District in and for said County.

THE CROOKE MINING AND SMELTING COMPANY
vs.
A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, JOSEPH NATHAN, JOHN SCHREINER, FRED. J. MILLER, and A. A. BOCK.

Robert Crooke, of the county and State aforesaid, deposes and says:

I. That he is the duly authorized agent of the Crooke Mining and

Smelting Company, a corporation duly organized under the readily virtue of the laws of the State of Colorado; which said corp. has duly complied with all and singular the laws of the State of Colorado relative to foreign corporations to enable it to do busine in this State; that the complaint in this action has been duly filed with the clerk of this court and a summons thereupon issued, and that the said action is brought for the purpose of recovering from the defendants herein and each of them the possession and occupation of a certain portion or parcel of the Annie Lode mining claim, situate in Galena mining district, in the county and State aforesaid; which said mining claim the plaintiff claims to own, possess, and have the right of occupation of by virtue of a purchase from the original locator thereof or his grantors, who acquired the
20 right to occupy and possess the same by virtue of a full compliance with the laws of the United States and of the laws of the State of Colorado relative to mining claims; which said portion or parcel of said lode is wrongfully and unlawfully claimed and occupied by the defendants and each and all of them as a part, portion, and parcel of the Monitor lode and mining claim, together with $500 damages and for the sum of $300 expended in preparing adverse claim.

II. That the defendants, A. R. Bushnell, John G. Clark, Adolph Nathan, John Schreiner, Joseph Nathan, Fred. J. Miller, and A. A. Bock, are non-residents of the State of Colorado, but reside, as deponent is informed and believes, in the State of Wisconsin, and that the said A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, and A. A. Bock each reside in the town of Lancaster, Grant county and State of Wisconsin, and the defendant Fred. J. Miller resides in the town of Prairie du Chien, county of Crawford and State of Wisconsin.

III. That a summons was duly issued out of this court to the sheriff of Hinsdale county, with directions to said sheriff to serve the same upon said defendants, and the said sheriff has returned the same to the clerk of this court with his return thereon endorsed to the effect that the said defendants or either of them could not be found in his county.

IV. That I have fully and fairly stated the facts of the case to M. B. Gerry, Esq., of Lake City, in the county & State aforesaid,
21 plaintiff's counsel in this suit, and I am by him advised and verily believe that the plaintiff has a good cause of action in this suit against the said defendants, A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, & A. A. Bock, & each of them are necessary and proper parties in said suit.

V. That personal service of said summons cannot be made on the said defendants or either of them. Wherefore plaintiff demands an order that service of the same may be made by publication.

ROBERT CROOKE.

Subscribed and sworn to before me Nov. 20, 1880.

[SEAL.] S. S. SHERMAN,
Notary Public.

d as follows:

STATE CO. Annie lode. District court. The Crooke Mining and *Hin*ing Company *vs.* A. R. Bushnell *et al.* Affidavit for publication of summons. Annie lode. Filed Nov. 23, '80. E. D. Bouton, clerk.

And afterward, on the same day, being in vacation succeeding the regular August term of said court, the following order was made and entered of record:

THE CROOKE MINING AND SMELTING COMPANY *vs.* A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock. } Annie Lode.

22 Upon reading and filing the affidavit of Robert Crooke, and it satisfactorily appearing therefrom to me, the clerk of the district court of the fourth judicial district of the State of Colorado in and for the county of Hinsdale, that the defendants, A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, reside out of this State and cannot, after due diligence, be found therein, and it appearing from the affidavit aforesaid that a cause of action exists in this action in favor of the plaintiff therein and against the said defendants, and that the said defendants, A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, are necessary and proper parties defendant thereto, and it further appearing that a summons has been duly issued out of said court in this action and that personal service of the same cannot be made upon the said defendants for the reasons hereinbefore contained and by the said affidavit made to appear, on motion of Gerry & Stirman, attorneys for the plaintiff, it is ordered that the service of summons in this action be made upon the said defendants by publication thereof in the "Mining Register," a newspaper published at Lake City, hereby designated as the newspaper most likely to give notice to said defendants, that such publication be made at least once a week for four successive weeks.

And it further, in like manner, satisfactorily appearing to me that the residence of said defendants A. R. Bushnell, John
23 G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, and A. A. Bock is known to be in the town of Lancaster, county of Grant, and State of Wisconsin, and that the residence of said defendant Fred. J. Miller is known to be in the town of Prairie du Chien, county of Crawford, and State of Wisconsin, it is ordered that a copy of the summons in this action be forthwith deposited in the post office, post paid, addressed to each of said defendants at his said place of residence.

Witness my hand and the seal of said court, at Lake City, in said county, this 23rd day of November, A. D. 1880.

E. D. BOUTON, *Clerk.* [SEAL.]

And afterward, on the 14th day of December, A. D. 1881, the second day of the regular December term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. }
vs. } 215.
A. R. BUSHNELL *et al.* }

This cause is continued for service of summons.

24 STATE OF COLORADO, }
County of Hinsdale. }

In the District Court of said County.

THE CROOKE M. & S. Co., Pl't'ffs, }
vs. } Annie Lode.
A. R. BUSHNELL *et al.*, Def'ts. }

To the clerk of said court:

The time for answering the complaint in the above cause having expired and the defendants having failed to answer or demur, you will enter default therein according to law.

GERRY & STIRMAN,
Att'ys for Pl't'ff.

Endorsed as follows:

8. 215. District Court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Annie lode. Application for default. Filed Feb'y 17,'81. E. D. Bouton, clerk.

25 STATE OF COLORADO, }
County of Hinsdale, } *ss:*

I, James F. Downey, of said county of Hinsdale, do solemnly swear that I am one of the publishers and proprietors of The Mining Register, a weekly newspaper printed and published in Lake City, in said county and State; and I further swear that the notice, of which the annexed is a true copy, has been published in said newspaper for four successive weeks, and the first publication of said notice was in said paper bearing date the 26th day of November, A. D. 1880, and the last publication of said notice was in said paper bearing date the 17th day of December, A. D. 1880.

JAMES F. DOWNEY.

Subscribed and sworn to before me this 26th day of January, A. D. 1881.

S. S. SHERMAN,
Notary Public.

[SEAL.]

STATE OF COLORADO, } ss:
Hinsdale County, }

In the District Court of said County, in the Fourth Judicial District of Colorado.

THE CROOKE MINING & SMELTING COMPANY, Plaintiff,
vs.
A. R. BUSHNELL, JNO. G. CLARK, ADOLPH NATHAN, JOS. NATHAN, JNO. SCHREINER, FRED. J. MILLER, and A. A. BOCK, Defendants.

The People of the State of Colorado send greeting to A. R.
26 Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, defendants above named:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court in and for the county of Hinsdale, in the fourth judicial district of the State of Colorado, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or, if served out of this county but in this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover the possession of a certain parcel of the lode or mining claim known as the Annie Lode mining claim, for the sum of five hundred dollars damages and three hundred dollars expended in preparing adverse claim, with costs of suit, and other relief particularly described in the complaint on file herein; also for interest thereon at the rate of ten per cent. per annum.

And you are hereby notified that if you fail to appear and answer the above complaint, as above required, the said plaintiff will apply to the court for the relief demanded in the said complaint.

Given under my hand and the seal of the district court
[SEAL.] of said Hinsdale county this 21st day of January, A. D. 1880.

E. D. BOUTON,
Clerk of District Court.

27 Endorsed as follows:

9. 215. District court. The Crooke M. & S. Co. *vs* A. R. Bushnell *et al.* Annie lode. Affidavit of publication. Filed Feb'y 17, '81. E. D. Bouton, clerk.

28 STATE OF COLORADO, } ss:
Hinsdale County, }

In the District Court.

CROOKE MINING & SMELTING CO., Pl'nt'ff, }
vs.
A. R. BUSHNELL *et al.*, Def'ts. }

The defendants herein appear, by their attorney, J. W. Mills, and demur to pl'nt'ff's complaint because it does not state facts sufficient to constitute a cause of action.

J. W. MILLS,
Att'y for Def'ts.

"Annie" adverse.

Endorsed as follows:
10. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Annie lode. Demurrer. Filed Feb'y 17, '81. E. D. Bouton, clerk.

And afterward, on the 11th day of April, A. D. 1881, being the first day of the regular April term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. }
vs. } 215.
A. R. BUSHNELL *et al.* }

This cause coming on to be heard, the plaintiff, by its attorneys, Gerry & Stirman, move to strike the defendants' demurrer from the files, and this cause is set for hearing at the incoming of court tomorrow morning, Ap'l 12th, A. D. 1881.

29 STATE OF COLORADO, }
County of Hinsdale. }

In the District Court of said County, at the April Term, 1881.

THE CROOKE MINING AND SMELTING COMPANY, Pl't'ff, }
vs.
A. R. BUSHNELL *et al.*, Def'ts. }

Comes now on this day the plaintiff, by its attorneys, Gerry & Stirman, and moves the court to strike from the files of this case the demurrer of defendants filed therein for the following reasons, to wit:

1st. Because said demurrer was not filed in apt time.

2nd. Because said demurrer was not filed within forty days after service by publication upon the defendants was complete.

3rd. Because said demurrer was not filed until after the plaintiff was entitled to default by law and had applied for same.

Wherefore, &c.

GERRY & STIRMAN,
Att'ys for Pl't'ff.

Endorsed as follows:

11. 215. District court. The Crooke Mining and Smelting Co. *vs.* A. R. Bushnell *et al.* Annie lode. Motion to strike demurrer from files. Filed Ap'l 12, '81. E. D.Bouton, clerk.

And afterward, on the 13th day of April, A. D. 1882, being
30 the third day of the regular April term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. }
vs. } 215.
A. R. BUSHNELL *et al.* }

This cause coming on to be heard upon the motion of the plaintiff to strike from the files the defendants, demurrer, the court, having heard the argument of counsel and being fully advised in the premises, doth sustain the said motion and order that the default of the said defendants be herein duly entered according to law.

31 STATE OF COLORADO, } *ss:*
Hinsdale County, }

In Dist. Court.

CROOKE MINING & SMELTING CO. }
vs. }
A. R. BUSHNELL *et al.* }

Now come the plaintiffs herein, by J. W. Mills, their att'y, & limiting their appearance for the purpose of this motion only, move to set aside the application for default filed by pl'nt'ff in the above-entitled case; also to vacate any default entered in pursuance of said application, & for cause shows:

1st. That the alleged service of summons in this case is by publication alone, & the defendants are all non-residents of Colorado. Wherefore there is no authority of law for application for default to the clerk of said court, such as made in this action, & the law allows such application to the court alone.

2nd. That such application for default & the order made or to be made in pursuance thereof is taken against said defendants by mistake, inadvertence, & excusable neglect & surprise, as shown by the affidavit filed herewith.

3rd. Because the service of summons herein is defective & void.

A. R. BUSHNELL,
By J. W. MILLS, *His Att'y.*

Endorsed as follows:
12. 215. District court. Crooke, &c. Co., *vs.* A. R. Bushnell *et al.* Motion to vacate default, &c. Term No., 9. Filed April 13, '81. E. D. Bouton, clerk.

32 STATE OF COLORADO, } ss:
Hinsdale County, }

In the District Court

Case. Term No., 9.

CROOKE, &C., CO.
vs.
A. R. BUSHNELL *et al.*

STATE OF COLORADO, } ss:
Hinsdale County, }

J. W. Mills, being first duly sworn, upon oath says: He is att'y for all of said def'ts & knows them all to be non-residents of Colorado & all now absent from the State; that the alleged service of summons in said case was made by publication alone & is defective & not in compliance with the law, as appears from order of publication, the affidavit for the same, & the proof filed of such publication; that before such publication expired & while it was still going on one E. I. Stirman, an att'y for pl'nt'ff & at that time pl't'ff's only att'y in this State, agreed with this affiant that he would not take default in said case if demurrer or answer were not filed strictly within the lawful time, and affiant said in consideration thereof he would answer or demur before this spring term of court & would put in no dilatory motions to delay a hearing, & told said Stirman he (the affiant) would therefore pay no further attention then to the time when said publication of summons herein
33 might expire; to all of which said Stirman replied, "All right," & this affiant relied implicitly on this agreement, & was greatly surprised when he discovered that default had been applied for herein; that affiant of his own knowledge knows defendants have a full and complete defense herein upon the merits & deposes to this as a lawyer.

J. W. MILLS.

Sworn to & subscribed before me this 13th day of April, 1881.
[SEAL.] E. D. BOUTON, *Clerk.*

Endorsed as follows:
13. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Affidavit in support of motion to vacate default. Filed Ap'l 13, '81. E. D. Bouton, clerk.

And afterward, on the 14th day of April, A. D. 1882, being the fourth day of the regular April term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. } 215.
vs.
A. R. BUSHNELL *et al.* }

This cause coming on to be heard upon the defendants' motion to set aside the default hereinbefore entered, the court, having heard the arguments of counsel and being fully advised in the premises, doth sustain the said motion; and the court doth further order that the defendants answer the plaintiff's complaint on file herein by the 15th day of June, A. D. 1881.

34 STATE OF COLORADO, } *ss*:
Hinsdale County, }

In the District Court.

THE CROOKE MINING & SMELTING CO. }
vs.
A. R. BUSHNELL *et al.* }

The defendants herein answer plaintiff's complaint as follows:

They deny that plaintiff is a corporation organized under the laws of the State of New York or otherwise; they deny that plaintiff has filed with the sec. of state of Colorado & in the clerk & recorder's office of Hinsdale county or with either of them copies of the articles of incorporation of said pl'nt'ff Co., duly & regularly certified by the proper officer of New York State or otherwise, and they deny that pl'nt'ff has in every respect or any respect complied with the laws of the State of Colorado relative to foreign corporations to enable the same to do business in this State.

They deny that on the 12th day of October, 1878, or at any other time pl'nt'ff was or has been the owner & in actual possession of the "Annie" lode or mining claim, 1,500 feet in length by 300 feet in width, or of any other length or width, situate in Galena mining district, in Hinsdale county, or in any other district or county.

They deny the pl'nt'ff's right to occupy & possess said "Annie" lode by reason of the conveyances set out in paragraph 3 of
35 pl'nt'ff's complaint or by any other means or through any other reason; they deny that pla'nt'ff purchased or had conveyed to itself from George L. Doherty or any one else the said "Annie" mine; they deny that said Doherty purchased or had said mine conveyed to him from Joseph R. Simons or any one else; they deny that said Simons purchased and had said mine conveyed to him by one John Doherty or any one else; they deny that John Doherty was the original discoverer & locator of said "Annie" lode; they deny that John Doherty acquired any right to occupy & possess said lode by virtue of discovering & locating said lode or otherwise;

they deny the sinking of a discovery shaft of any kind & by any person on said lode; they deny the posting of any notice whatever on any part of said lode; they deny that the surface boundary of said lode was marked by substantial posts or otherwise at the corners or any place else; they deny that within three months from the date of discovery or within any other period of time there was any location certificate of said mine filed with the recorder of said Hinsdale county, and they deny that there is any such lode or mine as the so-called "Annie" lode, and allege it to be a mere pretended, fictitious lode.

They deny that on the 1st day of Sept., 1879, or at any other time they wrongfully entered upon or entered upon at all any portion of said pretended "Annie" lode, either as described in paragraph 4 of plaintiff's complaint or otherwise, and they deny that they
36 have at any time wrongfully withheld or withheld at all the possession of any part of said pretended "Annie" lode from the plaintiff, to his damage in the sum of five hundred dollars or any other sum.

They deny this suit is brought in support of any adverse claim, & that plaintiff has paid out 300 dollars or any other sum for plats, abstracts, & copies of papers filed with pl'nt'ff's pretended adverse claim, & that plaintiff has paid seventy-five dollars or any other sum as counsel fee in preparing said adverse claim.

Wherefore defendants demand judgment against said plaintiff; that said complaint be dismissed, and that said defendants have and recover of the plaintiff their costs and disbursements herein.

J. W. MILLS,
Att'y for Def'ts.

Endorsed as follows:

14. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Answer. Annie adverse. No. 215. Filed June 10, '81. E. D. Bouton, clerk. J. W. Mills, att'y for def'ts.

37 STATE OF COLORADO, }
County of Hinsdale. }

In the District Court of the Seventh Judicial District of said State, Sitting in & for said County.

THE CROOKE MINING AND SMELTING COMPANY, Plaintiff,
vs.
A. R. BUSHNELL, JOHN G. CLARK ADOLPH NATHAN, JOSEPH Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, Defendants.

And now comes your petitioner, The Crooke Mining and Smelting Company, plaintiff in the above-entitled cause, and respectfully represents—

That the said The Crooke Mining and Smelting Company is and was at the time of the commencement of this suit a corporation duly

organized and existing under and by virtue of the laws of the State of New York, and by virtue thereof a citizen of said State of New York:

That A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, defendants in said cause, are citizens of the State of Wisconsin, and were citizens of said last-named State at the date of the commencement of this action.

38 That the present term of this said court is the first term thereof at which this said cause could be tried.

That said cause can be fully and finally determined in the United States circuit court for the State of Colorado.

That the amount in controversy in said cause amounts to more than the sum of five hundred dollars, exclusive of costs, and petitioner makes and files in this court a bond, with good and sufficient security, for their entering in said circuit court of the United States for the district of Colorado, on the first day of the next session, to be holden at Del Norte, a copy of the records in said suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit shall be wrongfully and improperly transferred thereto, and it hereby prays said court to accept said petition and bond and order the transfer of said cause to the said circuit court of the United States for the said district of Colorado. Petitioner will ever pray, &c.

GERRY & STIRMAN,
Attorneys for Plaintiff.

STATE OF COLORADO, }
County of Hinsdale. }

Personally appeared before me John J. Crooke, who, being duly sworn, on oath deposes and says that he is the duly authorized agent of the said Crooke Mining and Smelting Company and the business manager of said company for the State of Colorado; that he has read the foregoing petition for removal and knows
39 the contents thereof, and the same are true.

JOHN J. CROOKE.

Subscribed and sworn to before me this 2d day of August, A. D. 1881.

[SEAL.] S. S. SHERMAN,
Notary Public.

In the District Court of Hinsdale County, State of Colorado.

Know all men by these presents that we, The Crooke Mining and Smelting Company, as principal, and John J. Crooke and John H. Simmons, as sureties, are held and firmly bound unto A. R. Bushnell, John G. Clark, Adolph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock in the penal sum of one thousand dollars; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, representatives, and assigns, jointly, severally, firmly by these presents.

Given under our hands this 2d day of August, A. D. 1881.

The conditions of this obligation are these: That whereas the said The Crooke Mining and Smelting Company has applied to the district court of said county of Hinsdale, in the said State of Colorado, to remove a certain cause pending in said court, wherein the said "The Crooke Mining and Smelting Company" is plaintiff and said A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, and Fred. J. Miller and A. A. Bock are defendants,
40 from the said district court of the said county of Hinsdale to the circuit court of the United States for the district of Colorado:

Now, if the said The Crooke Mining and Smelting Company shall enter in the said circuit court of the United States for the district of Colorado, to be holden at Del Norte, in said State, on the first day of the next term thereof, a copy of the record in said suit, and shall pay all costs that may accrue or be awarded by said circuit court if it shall hold that said suit was wrongfully or improperly brought thereto, then this obligation to be void; otherwise in full force and effect.

CROOKE MINING AND SMELTING CO.,
By JOHN J. CROOKE, *Agent.*
JOHN J. CROOKE.
JOHN H. SIMMONS.

STATE OF COLORADO, }
County of Hinsdale, } *ss:*

John J. Crooke and John H. Simmons, of said State and county, the sureties named in the foregoing bond, being duly sworn, on oath, each for himself, deposes and says that he is worth the sum of one thousand dollars over and above all his debts and liabilities and exclusive of all property by law exempt from execution, and have property in said State of Colorado liable to execution of the value of more than one thousand dollars.

JOHN J. CROOKE.
JNO. H. SIMMONS.

41 Sworn to and subscribed before me this 2d day of August, A. D. 1881.

[SEAL.] S. S. SHERMAN,
Notary Public.

Endorsed as follows:

16. 215. District court. The Crooke Mining and Smelting Co. *vs.* A. R. Bushnell *et al.* Petition for removal to U. S. circuit court, dist. Colo. Filed Aug. 3, '81. E. D. Bouton, clerk. Gerry & Stirman.

42 District Court of Hinsdale County, Colorado.

THE CROOKE MINING & SMELTING CO.
vs.
A. R. BUSHNELL *et al.*

And now come the defendants in this action & object to the removal thereof to the United States circuit court for the district of Colorado, as prayed in the plaintiff's petition now filed, for the following reasons, to wit:

1st. The present term is not the term of this court at which said action could be first tried.

2d. Because of the insufficiency of the plaintiff's petition for such removal.

3d. Because of the insufficiency of the plaintiff's bond given for such removal.

4th. Because of other & further reasons apparent upon the face of the record, papers, proceedings, & minutes in this action.

And for the reasons above stated move to strike from the files of this court said bond and petition.

Dated August 3d, 1881.

J. W. MILLS,
Def'ts' Att'y.

Endorsed as follows:

43 17. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Motion to strike petition & bond for removal from the files. Filed Aug. 3d, '81. E. D. Bouton, clerk.

And afterward, on the same day, being the third day of the regular August term of said court, the following order was made and entered of record:

THE CROOKE MINING AND SMELTING CO.
vs.
A. R. BUSHNELL *et al.* } 215.

This cause coming on to be heard upon the plaintiff's application for removal of this cause to the United States circuit court, the court having heard the argument of counsel and being fully advised in the premises sustains said application; to which ruling the defendants, by their attorney, J. W. Mills, excepts.

The plaintiff having, therefore, within the time provided by law filed its petition for the removal of this cause to the circuit court of the United States, and having at the same time offered good and sufficient surety pursuant to statute, therefore the court, finding that the plaintiff is a resident of the State of New York and that it is entitled to such removal, do hereby accept said petition and bond and order that the said cause be removed for trial in the next circuit court of the United States for the district of Colorado, pursuant to the statutes of the United States, and all further proceedings in this court are hereby stayed; to which order the defendants, by their attorney, J. W. Mills, except.

44 *Pleas.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States in and for the District of Colorado, September Term, 1881, Sitting at Del Norte.

THE CROOKE MINING & SMELTING COMPANY
vs.
A. R. BUSHNELL *et al.* } No. 16.

This day comes the said defendants, by J. W. Mills, their attorney, and the said plaintiff, by M. B. Gerry, its attorney, also comes, and the motion of the said defendants to remand this cause to the district court of Hinsdale county, from whence this cause was removed into this court, came on to be heard, and, after argument of counsel, it is considered by the court that the said plaintiff hath not filed herein a sufficient bond as required by law and the said motion is allowed; and it is further considered that this cause be remanded to the said district court of Hinsdale county for further proceedings therein, and that said defendants recover of and from said plaintiff their costs herein expended, to be taxed, and that they have execution therefor.

STATE OF COLORADO, }
U. S. Circuit Court, Del Norte, } *ss*:

45 I hereby certify that the foregoing is a full, true, and correct copy of the order of the United States circuit court in the cause wherein The Crooke Mining & Smelting Company *are* plaintiff and A. R. Bushnell *et als.* are defendants, made and entered of record in said court, at Del Norte, Colorado, at the August term thereof, A. D. 1881.

Witness my hand and the seal of said court, at Del Norte aforesaid, this 21st day of Nov., 1881.

[SEAL.] EDWARD F. BISHOP, *Clerk*,
By J. W. ROSS, *Deputy*.

Endorsed as follows:

20. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Order U. S. circuit court. Filed Nov. 23, '81. E. D. Bouton, clerk.

And afterward, on the 5th day of December, A. D. 1881, being the first day of the regular December term of said court, the following order was made and entered of record:

THE CROOKE MINING & SMELTING CO.
vs.
A. R. BUSHNELL *et al.* } 215.

This cause is continued in accordance with stipulation on file herein.

46 I. The Dist. Court.

STATE OF COLORADO, } ss:
County of Hinsdale, }

CROOKE M. & S. Co., Plaintiff, }
vs. } General No., 215.
A. R. BUSHNELL *et al.*, Defendants. }

In District Court for said County.

It is hereby stipulated between the parties hereto & their respective attorneys that the trial of said cause be continued until the regular April term of said court in the year 1882.

GERRY & STIRMAN,
Att'ys for Pl'nt'ff.
J. W. MILLS,
Att'y for Def'ts.

Endorsed as follows:

21. 215. Crooke, &c. *vs.* A. R. Bushnell *et al.* In district court. No. 215. Stipulation to continue. Filed Nov. 26, '81. E. D. Bouton, clerk.

And afterward, on the 13th day of April, A. D., 1882, being the fourth day of the regular April term of said court, the following order was made and entered of record:

CROOKE M. & S. Co. }
vs. } 215.
A. R. BUSHNELL *et al.* }

This day came the parties hereto, by their respective counsel; also came the following-named persons as jurors, to wit, R. A. Austin, James Fuqua, C. Patg, John McMahon, W. B. Robison, Charles Andrew, Wm. Liggett, Milo Corwin, George Wilson, Daniel
47 Gaines, Terrence Brennan, E. P. Hill, who were duly impanneled and sworn according to law, and the trial proceeded; and, the said jury having heard the testimony adduced in part, this cause is adjourned until to-morrow morning at nine o'clock.

And afterward, on the 14th day of April, A. D. 1882, being the fifth day of the regular April term of said court, the following order was made and entered of record:

CROOKE M. & S. Co. }
vs. } 215.
A. R. BUSHNELL *et al.* }

This day came again the parties hereto, by their attorneys; also came he jury heretofore impanneled and sworn, and the trial proceeded; and, the said jury having heard the testimony adduced in part, this cause is adjourned until to-morrow morning at ten o'clock.

And afterward, on the 17th day of April, A. D. 1882, being the seventh day of the regular April term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. } 215.
vs.
A. R. BUSHNELL *et al.* }

This day came again the parties hereto, by their respective attorneys; also came the jury heretofore impanneled and sworn, and the trial proceeded; and, the said jury having heard the evidence adduced in part, this cause is adjourned until to-morrow morn-
48 ing at ten o'clock.

And afterward, on the 18th day of April, A. D. 1882, being the eighth day of the regular April term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. } 215.
vs.
A. R. BUSHNELL *et al.* }

This day came again the said parties, by their attorneys; also came the jury heretofore impanneled and sworn, and the trial proceeded; and, the said jury having heard the testimony adduced in part, this cause is adjourned until to-morrow morning at half past nine o'clock.

And afterward, on the 19th day of April, A. D. 1882, being the ninth day of the regular April term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. } 215.
vs.
A. R. BUSHNELL *et al.* }

This day came again the said parties, by their attorneys; also came the jury heretofore impanneled and sworn, and the trial proceeded; and, the said jury having heard the testimony adduced in part, this cause is adjourned until to-morrow morning at half past eight o'clock.

49 And afterward, on the 20th day of April, A. D. 1882, being the tenth day of the regular April term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. } 215.
vs.
A. R. BUSHNELL *et al.* }

This day came again the said parties, by their attorneys; also came the jury heretofore impanneled and sworn, and the trial proceeded; and, the said jury having heard the testimony adduced, this cause is adjourned until two o'clock to-morrow afternoon.

And afterward, on the 21st day of April, A. D. 1882, being the eleventh day of the regular April term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co.
vs.
A. R. BUSHNELL *et al.* } 215.

This day came again the said parties, by their attorneys; also came the jury heretofore impanneled and sworn, and the trial proceeded; and, the said jury having heard the argument of counsel and the charge of the court, retired to their room for deliberation, in charge of Harvey Lewis, who was duly sworn as bailiff.

And afterward, on the 22d day of April, A. D. 1882, being the 12th day of the regular April term of said court, the following order was made and entered of record:

50

THE CROOKE M. & S. Co.
vs.
A. R. BUSHNELL *et al.* } 215.

And now come said jury into open court and state that they are unable to agree upon a verdict; whereupon they are by the court discharged from further consideration of this case, and the case is continued.

And afterward, on the 8th day of August, A. D. 1882, being the second day of the regular August term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co.
vs.
A. R. BUSHNELL *et al.* } 215.

In this action it is stipulated between the parties hereto that each side shall be restricted to seven witnesses, except as to discovery and location of the several claims represented by said parties, and that no evidence will be submitted as to the annual labor performed upon said claims.

And afterward, on the tenth day of August, A. D. 1882, being the fourth day of the regular August term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co.
vs.
A. R. BUSHNELL *et al.* } 215.

51 This day came the parties hereto, by their respective attorneys; also came the following named persons as jurors, viz.,

Joseph Kelley, Robert Echlin, Michael Scannell, Barney Mallon, J. B. Talioferro, James Dugan, Sen., Walter Beam, John Mendenhall, Gus. Vincent, L. D. Estep, Wm. Pugh, R. R. Smith, who were duly impanneled and sworn according to law, and the trial proceeded; and, the said jury having heard the testimony adduced in part, the said cause was continued until to-morrow morning at nine o'clock.

And afterward, on the 11th day of August, A. D. 1882, being the fifth day of the regular August term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. } 215.
vs.
A. R. BUSHNELL *et al.* }

This day came again the said parties, by their respective attorneys; also came the jury heretofore impanneled and sworn, and the trial proceeded; and, the said jury having heard the testimony adduced in part, this cause is adjourned until eight o'clock to-morrow morning.

And afterward, on the 12th day of August, A. D. 1882, being the sixth day of the regular August term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. } 215.
vs.
A. R. BUSHNELL *et al.* }

52 This day came again the parties hereto, by their respective attorneys; also came the jury heretofore impanneled and sworn, and the trial proceeded; and, the said jury having heard the testimony adduced, it is ordered by the court, upon the request of both parties hereto, that said jury visit and examine the ground in dispute in charge of the sheriff.

And afterward, on the same day, the following order was made and entered of record:

THE CROOKE M. & S. Co. } 215.
vs.
A. R. BUSHNELL *et al.* }

Now come again the parties hereto, by their respective attorneys; also come the jury heretofore impanneled and sworn, and the trial proceeded; and the said jury, having heard the argument and the charge of the court, retired to their room for deliberation in charge of John O. Davis, who was duly sworn as bailiff.

And afterward, on the same day, the following proceedings were had and entered of record:

THE CROOKE M. & S. Co.
vs.
A. R. BUSHNELL *et al.* } 215.

Now come again the said jury with their verdict, in writing,
53 signed by their foreman, and say:

"We, the jury in the above-entitled cause, find this as special verdict as to this question, to wit, Does the original location certificate of the Monitor Lode claim contain such a description thereof with reference to some natural object or permanent monument as identifies the same with reasonable certainty? We answer the above question as follows, to wit, 'Yes.'

R. R. SMITH, *Foreman.*"

"We, the jury, find the issues joined for the plaintiff, and that it is the owner of and entitled to the possession of the ground described in the complaint.

R. R. SMITH, *Foreman.*"

Whereupon the defendants, by their counsel, give notice that they will move for a new trial of said cause.

54 And afterward, on the 15th day of August, A. D. 1882, being the eighth day of the regular August term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co.
vs.
A. R. BUSHNELL *et al.* } 215.

This cause coming on to be heard upon defendants' motion to set aside the verdict of the jury hereinbefore recorded and for a new trial of said cause, the court, being fully advised in the premises, overrules the said motion and orders that judgment be entered herein in accordance with said verdict; to which ruling the defendants, by their attorney, J. W. Mills, except.

It is therefore considered by the court that the said plaintiff is the owner and entitled to the possession of the Annie Lode mining claim, 1,500 feet in length and 300 feet in width, situate in the Galena mining district, in the county of Hinsdale and State of Colorado.

And thereupon the defendants, by their attorney, J. W. Mills, pray an appeal to the supreme court of the State of Colorado, which prayer is by the court granted.

And it is ordered by the court that the said defendants file herein their appeal bond in the sum of seven hundred dollars, with sureties to be approved by the clerk hereof, by the 11th day of December, A. D. 1882, and that the said defendants make their case and perfect their appeal on said day, and that their bill of exceptions also be settled on said day.

55 And afterward, on the 4th day of December, A. D. 1882, being the first day of the regular December term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. } 215.
vs.
A. R. BUSHNELL *et al.* }

In this cause the defendants appear, by their attorney, J. W. Mills, and pray the court to extend the time heretofore fixed for signing and sealing their bill of exceptions herein, and the court, being fully advised in the premises, after due consideration extends the time heretofore set sixty days, as per stipulation on file.

And afterwards, on the 12th day of December, A. D. 1882, being the eighth day of the regular December term of said court, the following order was made and entered of record:

THE CROOKE M. & S. Co. } 215.
vs.
A. R. BUSHNELL *et al.*. }

In this cause the defendants appear, by their attorney, J. W. Mills, and ask the court for leave to take the papers in this cause from the files hereof and remove them beyond the jurisdiction of this court; and the plaintiff, by its attorney, E. I. Stirman, consenting thereto, the court grants the said defendants leave to take and remove the said papers as aforesaid.

56 STATE OF COLORADO, } *ss*:
Hinsdale County, }

In the District Court in and for said Hinsdale County.

THE CROOKE MINING AND SMELTING COMPANY, Plaintiff, }
vs.
A. R. BUSHNELL *et al.*, Defendants. }

Be it remembered that on the trial of this cause in the district court within and for the county of Hinsdale aforesaid, at the regular August term thereof, A. D. 1882, the Hon. C. W. Burris, judge of said court, presiding, and a jury being regularly empanneled and sworn to try the issues herein, that then and there the following evidence was adduced herein and testimony taken and exhibits introduced and proceedings had, to wit:

Before any testimony is received herein defendants' counsel objects in open court to the reception of any testimony under plaintiff's complaint herein, because it does not state facts sufficient to constitute a cause of action, but the court overrules said objection; to which ruling of the court the defendants' counsel then and there in open court duly excepts.

57 To maintain the issue on the plaintiff's behalf, the following witnesses were sworn and testified, and testimony was offered and introduced as follows, to wit:

JAMES W. ABBOTT, called for plaintiff and sworn, testified as follows:

Q. Where do you live?
A. Lake City, Colorado.
Q. How long have you lived here?
A. Since June, 1875.
Q. What is your occupation?
A. Deputy U. S. mineral surveyor.
Q. What experience and knowledge have you of mines and minerals and metals?
A. I have been surveying lodes and lode claims on the surface and underneath for the last 7 years—a little over.
Q. Did you receive any education in that line before commencing active operations in the field?
A. I graduated from Yale in 1868 and took a three years' course in the Sheffield Scientific School after that, from which I graduated as civil engineer.
Q. Did that include mineralogy or geology?
A. We studied geology a good deal, and used to go out with Professor Dana a good deal for trips around observing the zoological formations, &c.
Q. State what study you have made of vein or lode phenomena since you have been actively engaged in the field.
A. The kind of study that I have made of lode phenomena has been for practical purposes, to enable me to use my judgment in advising claimants as to where their veins run when they were not perfectly plain to be seen on the surface, and also the forma-
58 tion of veins with reference to their value pecuniarily.
Q. How much work and investigation have you made of what is known as the hill or the mountain up Henson creek?
A. I commenced surveying there in 1876, and I don't believe there has been any two months since that time that I have been in the San Juan that I have not surveyed up there, more or less.
Q. Is that the mountain upon which the Ute, Ulè, Annie, and Monitor claims are situated?
A. It is; yes, sir.
Q. Have you in that locality made careful examination with reference to the lodes or veins found upon the mountain?
A. I have, very. I have been through every foot that was opened up 3 or 4 months ago.
Q. Do you understand the characteristics of the veins as they are opened up there?
A. I feel that I do.
Q. Who made that map?
A. It was made in our office from my notes, under my own personal supervision.

Q. Did you help make the surveys from which that map was taken?

A. I made them myself, and checked the exterior lines of these claims, so that I know that the relative positions of the different claims are accurate, and also that the workings as shown and sketched on the map are put from the field-notes as actually taken.

Q. For the purpose of determining the boundary lines of the various claims, what did you use—that is, what certificates or descriptions did you go to?

A. For the Ute the official survey from the records of the
59 surveyor general's office. The same with the Monitor. The same with the Ulè. The Annie has never had anything on it but a preliminary survey made in 1878 or 1877, I forget which now. I had a connection between this corner up here and that corner of the Ute. I had another connection between this corner and the corner of the Monitor, and it was put on from those connections.

Q. Did you take the description from the location certificate of the Annie?

A. Yes, sir.

Q. I wish you would show to the jury now the exterior boundary lines first of the Ute and of the Ulè, then of the Annie and Monitor.

A. The exterior boundaries of the Ute are outside of these purple lines. The Ute begins there. The outside of the lines in every case is the boundary, and the line is made wide instead of coloring the whole surface ground. The Ulè is black and begins there by the side of Henson creek, and runs there. The names in each case are the same colors as the exterior boundaries of the claims. The exterior boundaries of the Monitor are red and the lettering red. That is from the official survey. The Annie is blue. That is a parallelogram.

Q. Do you know where the Annie vein upon which the Annie is located is?

A. Yes, sir.

Q. Will you point out to the jury where the Annie vein is?

A. The Annie vein was located at this point on the vein which is sketched in blue running up here and finally running into the Ute vein. There are two or three points where the Ute vein is
60 disclosed on the surface. Here, again, is another opening on the same vein, and so on, this blue line being drawn through these different points.

Q. I wish you would state to the jury, commencing at the lower point on the Annie claim, the different openings upon it and what those openings disclose.

A. I should be obliged to refer to my notes.

Q. Whatever is necessary to refresh your recollection.

A. "A" is a point outside of the Annie lines. It is just below the toll road, on the left-hand side as we go up to the Ulè office, 4 or 500 feet, maybe, this side of the Ulè office. It is a shaft cuts the vein 20 feet below the surface. The vein is about 4 feet wide, with a dip of about 80° from the horizontal. It was the first opening

ever made on this vein. It was the point where the vein now called the Annie was discovered. The location was made on it in 1876. That has since been abandoned. That was called the Rachel location. They prospected along on the vein, and found it, and at that point, "C"—the Annie claim—it cuts the vein about 12 or 14 feet below the surface. There is a good deal of debris in the bottom now. It shows a good strong vein. "B" is a few feet below that. "C" is on the upper side of the road, commencing up the road from the Ule office. "B" is on the lower side of that road. It cuts the vein about 13 feet below the top, showing a good strong vein, with a dip of about 74°.

61 Apparently they did not reach either wall in making that shaft; didn't get the shaft wide enough. The point "D" is an open cut that was worked by the claimants on the Monitor several years ago; it shows a vein, a very good, strong vein, with considerable mineral in through the quartz, galena and iron pyrites and, I think, copper pyrites, but principally galena and iron pyrites. It is fully as strong in "D" as in "A" or "B." "E" is the point where the vein shows in a long cross-cut; that was made by the claimants of the Annie for prospecting last fall or spring; it does not show very much, except that there is a vein there; it shows quartz with mineral scattered through it. Here "O" is a long, rather deep cut between "E" and "F." This shows on the west side the Annie vein, a good, strong vein; on the east side it shows also a strong vein—in other words, in this long cut we find 2 separate and distinct bodies of quartz, evidently belonging to a vein. At the time when I testified before I supposed that both of those belonged to the Annie vein. I have since changed my mind somewhat about that. I think this belongs to that vein that can be traced up there in the direction of the Enterprise. I remember testifying before if the vein could be traced in that direction on up there I should believe it ran there, and I do now. "*f*" is a cut a little ways above that long one; that also discloses the vein. "*g*" is a shaft sunk below the road that goes up to the Ute. It cuts the vein 10 feet below the surface—that is, 10 feet down below

62 the top of the rock; the dip is about 73°; the vein is well defined and about 4 feet wide. "*h*" is an old opening above the road, which also shows the vein a good, strong vein. This point is between "*h*" and "*i*," just on the upper side of the road. They have disclosed the vein there, but have not sunk on it. "*i*" is a shaft; it cuts the vein 10 feet below the top; dip about 75°; foot wall well defined. They did not get in far enough, apparently, to find the hanging wall. Between "*i*" and "*j*" is another opening that shows signs of vein matter. It belongs to the same system. I don't know but it may be a little to the east of the main part of the vein. I rather think it is. "*j*" is a shaft; it cuts the vein 20 feet deep; hanging wall is well defined; the foot wall, apparently, they did not reach; dip, 75°. Unquestionably on the Ute vein. "K" is another shaft, 13 feet deep; it shows about the same size and strength of the vein as in "*j*;" it is not quite so long a shaft; dip in that is about 80°, apparently. "L" is a shallow cut, a kind of a cross-cut,

longer than is shown on the map, but where it is marked black is where, in making the cross-cut, they disclosed the Ute vein. "X" is the point where a cross-cut run in that direction for the purpose of working the Ute vein struck the vein. These other points are the main workings in the Ute.

Q. You say "C" is the discovery shaft of the Annie claim?

A. Yes, sir.

Q. Will you run your pointer along the vein upon which that discovery shaft is sunk?

A. I don't know anything about the vein below "A."

63 Through *b*, *c*, *d*, *e*, and the western part of this long cut, *f*, *g*, *h*, *i*, *j*, K, *l*, on up through the Ute.

Q. Why do you say that that is the vein upon which the discovery shaft "C" on the Annie is sunk?

A. Because in prospecting that hill they have found it in so many places that are virtually on the same line that it amounts to a demonstration.

Q. How positive are you in that belief or opinion or conclusion that that is the Annie vein?

A. I don't think there is a shadow of question.

Q. Are you familiar with a description of the part of the Annie claim that is in controversy?

A. Yes, sir.

Q. I will refer you to the 4th clause in the complaint in this case, which contains a description of the ground that is now in controversy, and I will ask you to state if you recognize the description and if you can point out on the map the ground that is in controversy.

(The witness reads from the complaint and points out on the map the ground in controversy.)

Q. Draw your pointer along the line?

(Witness does so.)

Q. It is this ground, then, this little triangle here, and this piece included in here?

A. It is that part of the Annie claim which is within the Monitor lines and southwesterly of the Uli.

Q. State to the jury what these blue lines drawn where my pencil goes along represent.

A. Those blue lines are sketched in to connect the open-

64 ings made along the Annie vein, and give an idea where the Annie vein is in these points where it is not opened.

Q. It is intended to represent the Annie vein?

A. It is intended to represent the Annie vein.

Q. I wish you would examine this location certificate of the Annie claim, marked Plaintiff's Exhibit "A," and state whether or not the Annie claim is located on that map in accordance with the description contained in that certificate?

A. It is.

Q. There is an application for a patent for the Monitor claim?

A. There is; yes, sir.

Q. And the lines of the Monitor are laid upon that map in accordance with the survey for that patent?

A. Yes, sir.

Q. And the relative positions of the two claims are correctly given upon that map?

A. Yes, sir.

Q. And it is by virtue of the location of the two claims that this area has been put in controversy?

A. Yes, sir.

Cross-examination:

Q. What was your testimony at the last term of this court in the trial of this cause as to the vein that was exposed in the east end of that cut "O," between "*e*" and "*f*"?

A. I thought there was a horse between here and there—two parts of the same vein.

Q. I will ask you to state how positively you swore that there was a horse?

65 A. I swore with a great deal of positiveness that I thought there was.

Q. What explorations have been sunk between the east end of that open cut between points "*e*" and "*f*" and the last of that stripping that was done at the time of the last trial?

A. The trial extended over several days.

Q. That is the last of the continuous stripping down there on that vein coming down the hill?

A. Yes, sir.

Q. Was not all that stripping done at the time you testified last upon this witness stand?

A. When I testified that I was satisfied that there was a horse in here that had not been done.

Q. Did you correct your testimony to the jury?

A. I don't know that I did.

Q. You had sworn positively?

A. I had sworn positively that it was my impression that that vein here and there in "O" were the same vein.

Q. After you swore to that you were again on the witness stand?

A. Very likely.

Q. And when you were on the witness stand this last stripping down to that point had been done, had it not?

A. Very likely it had. I don't recollect about the different times.

Q. State what it is that has changed your mind since, if there has been no explorations on the vein.

A. At the time that I gave my testimony about that I did not know anything about the character of this vein. Perhaps it might have been disclosed in (one?) or two points, but my theory

66 about that at that time and as since disclosed by developments are two distinct things

Q. Are there developments there that were not there at the time of the last trial?

A. There are developments I had not seen until last week.

Q. What developments are those?

A. Developing and showing that this vein runs continuously from here down to there—"O."

Q. Don't you know that when you were last on the stand the Monitor vein had been stripped from there down, and didn't you mark it so on your map?

A. Yes, sir. I am not talking about the Enterprise vein.

Q. Didn't you testify that the Enterprise vein did not come down into the east end of "O"—the open cut between "*e*" and "*f*"?

A. No, sir; I did not. I testified that, in my judgment, the vein from here to there was continuous into that pit.

Q. And what did you say we had disclosed in that pit at the east end? Did you admit that?

A. I admitted that, in my judgment, this vein was continuous and was seen in this pit. After this opening was made I testified that I believed that there was a vein running from this point down into this pit.

Q. Into that pit?

A. Yes, sir.

Q. You think that is in your testimony?

A. Yes, sir.

Redirect examination:

67 Q. When you were first upon the witness stand I will ask you if any of the explorations had been made which disclosed this vein concerning which Mr. Mills has interrogated you?

A. When I was first on the stand those explorations had not been made. After that testimony had been given I went up onto the hill and saw those explorations, and I was satisfied that there was a vein running from here to there. I so testified, but I testified that I believed it was a spur. I had no idea it was continuous on either side.

Q. Why had you no idea it was continuous?

A. Because I had not seen it. There were no explorations.

Q. Before the conclusion of the last trial, after the explorations, did you not put this vein upon the map?

A. I did put that vein upon the map and distinctly stated I believed that vein ran down into the Annie vein in that hole.

Further cross-examination:

Q. Why didn't you mark that vein as running into the Annie at that pit "O"?

A. I have only marked it where it was disclosed.

Q. Is that Annie only marked where it is disclosed?

A. It is in black.

Q. Then you testify now that the vein that comes down the hill—

what you call the Enterprise—comes into the east end of "O," the open cut between "*e*" and "*f*"?

A. I have not the slightest doubt of it.

JOSEPH A. SIMONDS, called for plaintiff and sworn, testified
68 as follows:

Q. Where do you live?

A. My family is at Alamosa; I am living at Summitville.

Q. What is your occupation?

A. I am a miner.

Q. What experience have you had in mining?

A. Going on 17 years. I am now superintendent of Judge Bowen's mines in Summit district, of the Odin mines.

Q. Where have you mined?

A. In Clear Creek county, Gilpin county, this county 3 years, and I am mining now at the Summit. I have mined nearly all over the State in places; on this Ute hill 3 years.

Q. You mined on the Ute hill?

A. Yes, sir; 3 years.

Q. For whom?

A. John J. Crooke, and part of the time for the Crooke Mining and Smelting Company.

Q. What were you doing when you were in this occupation?

A. Well, I contracted first; then was foreman of the mine; contracted again, and then was superintendent of the mine when I left, in 1879.

Q. How familiar with the hill did you become?

A. Quite familiar with it.

Q. Do you recollect about the discovery and location of the Annie lode?

A. The 12th day of October, 1878, I wrote the stake myself for Mr. John Dougherty.

Q. Who was it made the location and discovery?

A. John Dougherty.

Q. Where is the discovery shaft on that map?

A. At "C."

Q. Had you before that located a claim upon the same vein?

69 A. Yes, sir; I located this, if I remember right, in June, 1876, at point "*a*," called the Rachel lode. I done the assessment work there myself, the first 10 feet.

Q. What do you know about the discovery of the lode at point "*c*" by Mr. Dougherty?

A. I know there was a lode there discovered, staked, and worked.

Q. What do you know about the shaft being sunk?

A. It was sunk nearly 11 feet on the lower side.

Q. What was disclosed?

A. Silver-bearing rock—a streak of quartz 3 feet wide.

Q. Had the Rachel been abandoned?

A. The Rachel location had been abandoned at that time.

Q. What do you know of a discovery stake being erected there?

A. It was put there; I wrote it myself and set it up.

Q. What was placed upon that stake?

A. It was just locating the claim—1,350 feet northeast and 150 feet northwest from the shaft.

Q. The name of what locator and of what lode was on that stake?

A. John Dougherty, and it was called the Annie lode.

Q. Was there any date placed upon it?

A. October 12, 1878.

Q. State to the jury what you know about that claim being staked at that time, the corners and sides.

A. At the time the discovery was made?

Q. The time of the location.

A. The time the location was made Mr. Abbott made a survey after the location work had been done, and there was corner
70 stakes here—4 end stakes—one here and one there, and one here and one there, and 2 center stakes with the faces hewed.

Q. The sides in towards the claim?

A. Yes, sir.

Q. Did you see them set in the ground?

A. I was not there; 2 of my men helped him set them. I think these stakes here were set in the ground and surrounded with rock, and these in the same way. I think one of the corner stakes was a stump.

Q. The claim was staked in the usual way?

A. Yes, sir.

Q. State if you recognize that as being a copy of the location certificate.

A. Yes, sir; that is the description of the claim. It is not his signature.

The plaintiff then offered in evidence said certified copy of the location certificate of the Annie lode to the admission of which the defendants objected on the ground that it was incompetent and insufficient; but the court overruled the defendants' objections; to which ruling of the court the defendants, by their counsel, then and there excepted. Said certificate is hereto annexed, marked Plaintiff's Exhibit A.

Q. Do you know that the location certificate was filed for record?

A. Yes, sir.

Q. Have you made an examination of the Annie lode?

A. Yes, sir; I have been on it several times

Q. Will you draw the pointer along the Annie lode upon that map and then state to the jury what you discovered in each one of the openings along the vein?

71 A. This vein runs right up this way. This is the discovery shaft, "*c*." This, "A," is the old discovery shaft of the Rachel, discovered in 1876 ("*a*"). That is about 20 feet deep, it lacks a few inches, showing a vein of about 4 feet of good quartz, galena, and iron, &c. This is the discovery shaft of the Annie ("*c*"). This here

I should say is 3 feet or 3 & ½ wide of good mineral-bearing rock, about 11 feet deep. This, "D," is a cut run by somebody, I don't know who, on the same vein. Then it comes right up here and dips down in that rock. Here, "E," is a big long cut, and here in the Annie again, in the west end of this cut "O," showing quite a strong vein. Here, "F," is another cut about 8 feet deep, showing a good strong vein, and here, "G," is another, and so on up. All these show good veins right along up here to the end of the Annie vein. This here is the Ute, joining right on.

Q. Have you any doubt in your mind, or how clear are you that that is the Annie vein as you have described it?

A. I am very positive.

Q. Have you any doubt?

A. No, sir.

Q. It is traced nearly along the line?

A. Clear along, showing a good crevice all the way, wherever a hole is sunk.

Q. I call your attention to "*o*," this broad opening.

A. "*o*" in the east end of that there is another strong vein, quite a good large vein. This cut is probably 20 feet long. There is a vein in the west end and a vein in the east end.

72 Q. What was your belief about that at the last term of court?

A. That there was a horse in there, and that this vein in the east end of "*o*" would swing around and come into the Annie. Since I have testified this cut has been nearly cut down as far as this and shows it coming right through this "O." It has been stripped, showing a good vein coming right along. Right under this dump where this dirt is it shows a vein cutting right through the Annie.

Q. This work was not done at all at the last term of the court?

A. No, sir; this work I never saw until I came back. There was 2 or 3 little pits when I was here before, but not enough to demonstrate.

Q. You now testify concerning an inspection of work actually done?

A. Yes, sir; here is a vein running right down here, a good strong vein.

Cross-examination:

Q. What do you say is your business?

A. Miner.

Q. At the Odin mine?

A. I am superintendent of the Odin mining property.

Q. You say you located the Rachel?

A. I located the Rachel in 1876; I think in June. I have the exact date in my pocket. (Reads:) June 10th, 1876.

Q. Who were your colocators in that lode?

A. E. B. Flora, A. M.; A. J. Goble, C. M.; Sherman and Joseph R. Simonds. They got my name Simmonds, but it is Simonds.

Q. What work did you do upon that location?
73 A. I sunk there about 11 feet and then let a contract.
Q. When?
A. In June; some of it in July, 1876.
Q. What did you or any of your colocators do in 1877?
A. I sunk that shaft in 1877. This is the Rachel ("*a*"). I sunk that in 1876, and in the winter of 1876–'77 this hole was sunk below the road ("*b*"). That assessment was done in the fall of 1876 before 1877.
Q. Which was?
A. "*b*."
Q. What did you do in 1877?
A. Let it run out.
Q. Do you remember seeing Mr. Bushnell here in 1877?
A. Yes, sir.
Q. Do you remember claiming to Mr. Bushnell that you had done the work on that lode in 1877?
A. I think I did.
Q. Was that true?
A. I don't know whether it was or not. Me and him were talking together a good many times. He was trying to get the best of me and I tried to get the best of him.
Q. You don't know whether that statement was true or not?
A. I disremember now. Anyhow, if I told him I done it there I probably did. I don't remember telling him I done that.
Q. If you did it, it was not relocated the 12th day of October, 1878, was it?
A. I think it was. I done that work in 1876; I think in the fall—during the winter of 1876–'77—I won't say positive. I know I done the work and let the contract and the boys were not willing to pay me for my work and I relocated the claim.
Q. You relocated the mine because the boys would not pay
74 you for the work you had done?
A. Yes, sir—that is, I didn't relocate it; John Dougherty relocated it.
Q. John Dougherty is your brother-in-law?
A. Yes, sir.
Q. He located it and deeded it to you? There was no consideration for the deed?
A. I don't know. I guess there was.
Q. Was there an actual consideration?
A. Yes, sir.
Q. What was it?
A. It cost me about $400.
Q. How did you pay him?
A. Because he owed it to me and I took the property for it. He was owing me money at the time.
Q. Did he locate that of his own volition?
A. He located it.
Q. You were present?
A. Yes, sir.

Q. And wrote the stake?
A. Yes, sir.
Q. All he had to do was simply to allow you to use his name?
A. No, sir; he located it and I put some men to work on it.
Q. And you paid the men?
A. I paid the men.
Q. What ground were you trying to cover at the time you located the Annie?
A. The old location of the Rachel. This here was inside of the Ulè ground, and then I came outside and located here.
Q. On the Monitor ground?
A. Not that I knew at the time.
Q. Was it not on the Monitor ground?
A. It looks like it now, but not what was the Monitor ground then. I can show you the southwest corner stake.

Q. That southwest corner stake has been setting there a
75 good many years?

A. Yes; but it was not there in 1876. It was about 75 feet here on the Ulè. John Conkey came down on the 4th day of July with guns and tried to drive me out of my shaft.
Q. What vein were you trying to locate?
A. I had already located the Rachel. I did not interfere with him nor he with me, but he tried to bulldoze me with a six-shooter on. By taking his stake here his line ran right up here then and he lapped it right up in here.
Q. That does not come within your line yet?
A. It was at that time the Rachel. I had 84 feet down this way and 1,460 up that way.
Q. What vein were you trying to locate?
A. The same vein I had here in the Rachel—the extension of the Ute mine.
Q. What shaft shows the strongest vein on the workings of the extension of the Ute?
A. They are all good strong veins.
Q. What is the oldest shaft?
A. The Rachel.
Q. What is the next?
A. "*b*."
Q. What is the next?
A. The discovery of the Annie.
Q. What is the next?
A. Letter "*a*" is the Rachel; that is the oldest.
Q. What is the next?
A. I think that it is letter "*k*"; then this "*b*" comes in.
Q. Was this "*k*" an opening on the Ute vein?
A. Yes, sir.
Q. Did you suppose that to be an opening on the Ute vein?
A. Yes, sir.

Q. If you supposed you were locating the extension of the
76 Ute vein when you located the Annie in 1878 and were present, why didn't you take in that shaft "*k*"?

A. Because I wanted to get all the ground down here I could. I wanted to start from here and make my lines not interfere with the Ute.

Q. If you had taken in "*k*" and "*j*" it would have interfered even less?

A. "*k*" was on the lines of the Ute ground. Here is the place where I wanted my discovery shaft.

Q. Suppose you had located your vein so that it ran up in this direction and covered "*k*" and "*j*," what was there to interfere?

A. I ran up to where it connected with the Ute. That was all I cared for.

Q. Is it not a fact that you located that ground to take in that tunnel?

A. No, sir; that tunnel was not spoken of at the time. They never talked of it until the Crooke Mining and Smelting Co. took hold of it.

Q. When was that?

A. 1879, I think.

Q. Didn't you locate this Annie for the purpose of compelling Mr. Crooke to buy that ground?

A. No, sir.

Q. Hadn't he to buy your Annie ground in order to get ground to run in that tunnel?

A. No, sir; not that I know of.

Q. Didn't you tell me in my office that you had done it with that express purpose?

A. No, sir; I located it because I thought it was the extension of the Ute.

Q. Then why didn't you get your eastern line further over on the Ute vein?

A. Because I struck the vein here.

77 Q. Why didn't you take in "*j*"? That is not on the Ute ground.

A. I ran right up to where I thought this ran on the Ute and stopped there and swung off.

Q. Had not I in 1878 a sewing-maching claim against you and didn't I present it and you told me you held Mr. John J. Crooke's note for this Annie lode; that you had located the Annie for the express purpose of compelling him to buy it from you in order to run in that tunnel?

A. I couldn't tell you that. I had already located it before the tunnel was talked of.

Q. Didn't you tell me when that note was paid you would pay the claim?

A. I don't think I did.

Q. You say you did not at the time state that was the object of locating the Annie claim?

A. I do, sir.

Q. And you located in this way and still did not straddle the Ute vein?

A. I did not straddle it after I came to the Ute ground.

Q. What vein did you say that was coming down the hill?
A. That is what they call the Enterprise, I believe.
Q. Where is that located?
A. Here is the discovery shaft right here.
Q. How far from the Monitor shaft?
A. It is probably 20 feet or 30 feet—something like that.
Q. Where do you say that that vein comes down the mountain?
A. Right down as this line comes. I suppose it ends here and shows itself again in the east end of this long cut "O".

Q. How does the vein come out of the Monitor shaft down
78 that hill?
A. ——.

Objected to by plaintiff as not cross-examination. Objection sustained and defendants except.

Q. You say the Enterprise comes down the hill as you have pointed out on the map?
A. Yes, sir.
Q. Is there not another strong vein coming down and running in the same crevice, starting from the Monitor shaft?

Objected to by plaintiff as not cross-examination. Objection sustained and defendants except.

Q. I will ask you if there is not a much stronger vein starting from this point following down the red line and intersecting there with the black and following the black on down and intersecting with the Annie vein?

Same objection made by plaintiff. Objection sustained and defendants except.

Redirect examination:

Q. With reference to the location of the Annie claim, you aimed to cover with the Annie claim all of the Ute lode that you could without interfering with the Ute claim?
A. Yes, sir.
Q. And when you reached that part of it, being so near the end, you were satisfied?
A. Yes, sir.
Q. That shaft "K" was there at the time?
A. Yes, sir.
Q. It was a Ute working?
A. It was worked by other parties.

79 The plaintiff then offered in evidence a certified copy from the office of the secretary of state of the articles of incorporation of the Crooke Mining and Smelting Company; to the admission of which the defendants objected on the ground that it was incompetent and insufficient, but the court overruled the defendants' objections and admitted said instrument in evidence; to which ruling

of the court the defendants, by their counsel, then and there excepted.

Said instrument is hereto annexed, marked Plaintiff's Exhibit B.

The plaintiff then offered in evidence a certified copy of a resolution of said Crooke Mining and Smelting Company declaring where the business of the company should be carried on and appointing John J. Crooke as the authorized agent of the company; to the admission of which the defendants made the same objections, but the court overruled the defendants' objections and admitted said paper in evidence; to which ruling of the court the defendants, by their counsel, then and there excepted. Said paper is hereto annexed, marked Plaintiff's Exhibit "C."

The plaintiff then offered in evidence a certified copy of the same resolution from the office of the clerk and recorder of Hinsdale county; to the admission of which the defendants made the same objections, but the court overruled the objections and admitted said paper in evidence; to which ruling of the court the defendants, by their counsel, then and there excepted. Said paper is hereto annexed, marked Plaintiff's Exhibit "D."

80 The plaintiff then offered in evidence a mining deed for the Annie lode from John Dougherty to Joseph R. Simonds; to the admission of which the defendants objected, on the ground that said instrument shows on its face that it was executed before the grantor had any title to the property undertaken to be conveyed, and also on the ground that it was incompetent and insufficient, but the court overruled the defendants' objection, and admitted said instrument in evidence; to which ruling of the court the defendants, by their counsel, then and there excepted. Said instrument is hereto annexed, marked Plaintiff's Exhibit "F."

The plaintiff then offered in evidence a certified copy of the laws of the State of New York under which the Crooke Mining and Smelting Company is organized; to the admission of which the defendants objected, on the ground that it was incompetent and insufficient, but the court overruled the objections and admitted the same in evidence, and the same is hereto attached, marked "Plaintiff's Exhibit E;" to which ruling of the court the defendants, by their counsel, then and there excepted.

Thereupon the defendants moved the court to strike from the evidence the location certificate of the Annie lode, "Plaintiff's Exhibit A," on the ground that the deed just admitted in evidence, Plaintiff's Exhibit "F," shows that at the time of the recording of that certificate John Dougherty had no interest whatever in the property attempted to be located by that certificate, having previously conveyed all his

81 interest in that property, but the court denied the defendants' motion; to which ruling of the court the defendants, by their counsel, then and there excepted.

The plaintiff then offered in evidence a deed from Joseph R. Simonds to *George L. Dougherty; to the admission of which the defendants objected as incompetent and insufficient, but the court

*On margin in pencil: Not Geo. L. Dougherty; John Dougherty.

overruled the objections and admitted said instrument in evidence; to which ruling of the court the defendants, by their counsel, then and there excepted. Said instrument is hereto annexed, marked Plaintiff's Exhibit "G."

The plaintiff then offered in evidence a deed from Dougherty to the Crooke Mining and Smelting Company; to the admission of which the defendants made the same objection, but the court overruled the objections and admitted said deed in evidence; to which ruling of the court the defendants, by their counsel, then and there excepted. Said deed is hereto annexed, marked Plaintiff's Exhibit "H."

The plaintiff then offered in evidence two certificates of the register of the U. S. land office, showing the application for patent for the Monitor lode and the filing of an adverse claim by plaintiff, to the admission of which the defendants made the same objections, but the court overruled the objections and admitted said paper in evidence; to which ruling of the court the defendants, by their counsel, then and there excepted. Said papers are hereto annexed, marked, respectively, Plaintiff's Exhibit "I" and "J."

J. W. O'BRIEN, called for plaintiff and sworn, testified as follows:

Q. Where do you live?

82 A. My family resides in Lake City. I am operating at San Miguel.

Q. What is your business?

A. Miner.

Q. How long have you been a miner?

A. About 15 years.

Q. Where have you mined?

A. Colorado, New Mexico, and Arizona.

Q. What has been the character of your mining?

A. Principally silver mining.

Q. How constantly have you been engaged in mining?

A. I have followed no other business for 14 years.

Q. In what capacity have you worked in mines?

A. I have principally worked mines for the profits derived from working them—my own mines, and leased others.

Q. You did not always derive profits?

A. Sometimes I have not. That was what I was mining for.

Q. What are you doing at San Miguel?

A. I am leasing the Cimmarron mine, working it under a lease.

Q. Have you examined the lode that is called the Annie lode?

A. To some extent; yes, sir.

Q. When?

A. Last April.

Q. Have you examined it since then?

A. No, sir.

Q. Did you examine it last April sufficiently to satisfy yourself as to its identity and existence as a vein?

A. Yes, sir.

Q. Will you point out on that map where the Annie lode or vein is?

A. This point, "*c*," is the discovery shaft, I think. There is a shaft at point "*a*." I would say — is on the same vein as "*c*," and then it can be traced in "*b*" and several of the openings. I
83 don't think I could just designate the points at present, it has been so long since I was there.

Q. Have you any doubt in your mind, as a miner, as to that being the Annie lode indicated by the blue line and the various openings upon it?

A. No, sir; I have none.

JOHN J. CROOKE, called for the plaintiff and sworn, testified as follows:

Q. You are the agent of the Crooke Mining and Smelting Company?

A. I am.

Q. And its mines and its smelters are being worked under your directions and supervision?

A. They are.

Q. Mr. Crooke, how long have you had mining knowledge and experience?

A. Oh, 30 or 40 years.

Q. What is your age now?

A. Well, sir, I am 59—between 58 and 59.

Q. Are you familiar with the Annie claim?

A. Yes, sir.

Q. Are you familiar with the Annie lode?

A. Yes, sir; quite familiar with the Annie lode.

Q. Will you point out on the map where the Annie lode is?

A. From here to here.

Q. Running along the blue lines?

A. Yes, sir.

Q. Why do you say that that is the Annie lode?

A. Because of the exploiting that has been done. The vein matter has been uncovered—in fact, exposure of the vein.

Q. You know where the Annie discovery shaft is?

A. Yes, sir; I believe it is down here somewheres, "*c*."

Q. I will ask you to state if that discovery shaft is sunk on the vein marked on the map as the Annie.

A. ——.

Q. What relation does that vein bear to the Ute vein?

84 A. It is an extension.

Q. And that is one of the properties of the company?

A. Yes, sir.

Q. What doubt have you in your mind, as a miner, that that is the Annie vein or lode and the same vein upon which the Annie discovery shaft is sunk?

A. Well, sir, I have no doubt at all. So far as human knowledge goes, it certainly is an extension of the Ute vein.

Cross-examination:

Q. You don't mean to say that, so far as human knowledge could go, you are satisfied of that identity, do you?

A. Yes, sir; I do. I don't qualify at all.

Q. And you would not be any better satisfied if there was a drift run on the vein from end to end?

A. Not a bit. That is based on observation and scientific knowledge of the way veins make.

Q. I think you have drifted on what you claim to be that vein some distance?

A. Yes, sir.

Q. How far?

A. 60 feet.

Q. Not farther?

A. No, sir.

Q. Where is that drift?

A. It runs from the Ulè somewhere down here 300 feet below the surface and is run 60 feet, and she was such a "weeping" vein we had to stop. We had no pump down there and it bid fair to flood the whole mine. It carried the general angle; struck in there somewhere.

Q. It forms a connection with the Ulè?

A. Forms a junction, with country rock between in the vein.

85 Q. Is your judgment based entirely on surface indications and surface explorations?

A. Surface and subterranean. That was an indorsement, the striking of it down there—quite an indorsement.

Q. State fully what you consider to be the marks of that indorsement or what characteristics you deem to be that indorsement.

A. It is a vein there carrying mineral, galena, pyrites, and gray copper and vein matter.

Q. Is that all?

A. I have seen fluorspar come out, yellow copper, and I have seen some brittle silver.

Q. Are those all the reasons—the reasons discovered in that 60-foot drift?

A. There is a foot and hanging wall and gouge in the foot and hanging, both showing the walls of a crevice. The interior between the walls carries quartz and mineral, and is quite a powerful vein, besides that the quantities of water that came down showing that it was a powerful fissure and had a long run.

Q. Have you now stated all the reasons?

A. Then the croppings follow the angle from the surface down directly under the engine-house.

Q. You say there is identity in the character of mineral?

A. Yes, sir; it is Ute mineral. The Ute carries a little gouge and the Ulè don't. A man who understands them can tell the difference as well as a drover could tell one ox from another and where he got it and what he paid for it.

Q. The Ulè and Ute form a junction?

A. Yes, sir.

86 Q. You deem that they belong to the same family of veins?

A. Yes, sir; they are living quite close together.

Q. The mountain is a good deal broken up with veins?

A. No, sir; there are two main veins, the Ute and Ulè. Then, as I said before in my previous examination last spring, which you made a good deal of fun of, these main veins always carry branches and these branches carry laterals, just like the trees in the forests.

Q. Two main veins, you think?

A. Yes, sir.

Q. How far up have you explored the Ulè—up the mountain?

A. We have explored the Ulè a long distance not indicated on the map. I think it is a knowledge possessed by few. I have had curiosity to look into it. They may be classed together—two great veins—and "all the rest is leather and prunello." Don't amount to anything. Oh, might do to prospect a little bit; not veins to work.

Q. All the rest you deem as rather incidental to those great veins?

A. I think all the rest belongs to the system. You know branches and spurs and threads and all that sort of think must necessarily be. If you look on a crack of the ceiling you will see it.

Q. The California comes in above the Ulè, doesn't it?

A. Yes, sir.

Q. You deem that to be an extension of the Ulè?

A. I am not positive about that, sir.

Q. To what depth is the Ute explored—the greatest depth?

A. Couple hundred of feet.

87 Q. In what part of it is the deepest working?

A. I think it is in the second shaft.

Q. To what depth is the Ulè work done?

A. About 308 feet now to the bottom.

Q. At what depth was it you worked the junction of the Ute and Ulè?

A. 300 feet, I think, taken from the shaft curb.

Redirect examination:

Q. This is the Ulè vein to which you refer?

A. Yes, sir.

Q. You cut what you call the extension of the Ute in running the Ulè vein?

A. It was already driven. An exploration was ordered to get that junction and we got that junction.

Q. And when you got the junction out in this direction you then drifted back about 60 feet?

A. Yes, sir; we passed her, suspected her presence, but was driving on. We took no notice particularly at that time, but the weeping of the Ute indicated her presence.

Q. What is the length of that level on the Ute running on the vein?

A. Several hundred feet. This shaft is down in mineral all the way.

Q. From those subterranean workings there and the disclosures on the surface, you have no doubt that it is one and the same vein?

A. It is absolutely the same vein; no doubt about it at all.

JAMES W. ABBOTT, recalled for plaintiff, testified as follows:

88 Q. Can you state how the Annie claim came to be run so as to strike the Ute at that point?

A. The course of the Annie claim was taken from the disclosures at the lower end.

Q. Which disclosures do you refer to?

A. This Rachel shaft here and that discovery point. The discovery shaft was not sunk, as I recollect it, at the time, but they found the vein in scratching around here, and we set up the transit here and sighted along here.

Q. At the time that location was made what do you know about its being claimed to be the extension of the Ute?

A. Joe Simonds always said it was the extension of the Ute, but I did not believe it at the time.

Plaintiff rests.

Thereupon the defendants, to maintain the issues on their part, has sworn and examined the following witnesses, and offered and introduced the following evidence—that is to say:

ZENOS SNOWDEN, called for defendants and sworn, testified as follows:

Q. Where do you reside?

A. 5 miles and a quarter up Henson creek.

Q. Are you acquainted with the Monitor mining claim?

A. I am.

Q. When did you first become acquainted with it?

A. 1875.

Q. To whom did it then belong?

A. I supposed it belonged to McConkey and Ernest or Phillips; I am not certain.

89 Q. Do you know anything about any work being done on it in 1875?

A. I helped to do the work in 1875.

Q. How much work?

A. I think we sunk the shaft between 10 and 11 feet below the lowest rim of the shaft.

Q. Do you know whether there was any more work done on the discovery shaft that year?

A. I think in the fall.

Q. About what time in the year was it that you sunk this discovery shaft?

A. I don't remember precisely, but I think it was somewhere towards fall; some time the latter part of the summer, close to the fall.

Q. Did you assist anybody in setting up the stakes or any stake on the Monitor claim?

A. Yes, sir.

Q. Who?

A. Charles McConkey.

Q. When was that?

A. I don't remember; it was a little after we done this work—sinking this hole—this shaft.

Q. How many stakes did you assist him to put up?

A. 4.

Q. Which ones?

A. The lower ones and the center ones.

Q. The lower end stakes and the center side stakes?

A. Yes, sir; it was running southwest.

Q. Running down towards Henson creek?

A. Yes, sir.

Q. You assisted in putting out the stakes down towards Henson creek and the center side stakes?

A. Yes, sir.

Q. Did you ever see the upper-end stakes of the Monitor?

A. I have seen stakes up in here, but I can't read or write.

Q. Whereabouts did you see those stakes?

A. One of those stakes, I should take it, set in there. There was 2 stakes, which was said to be the Ute and the Monitor, pretty
90 close together; maybe 25 feet apart; maybe not so far.

Q. That is, the upper-end stakes of the Monitor and the lower-end stakes of the Ute were not far apart?

A. There was 2 stakes, said to be the Monitor and the Ute stakes; I couldn't say.

Q. Do you remember when you saw them?

A. If I am not mistaken, I think McConkey was the one who pointed them out to me, after we had set these other stakes, when we were up there sheep hunting. It was hard times then, and we were hunting sheep and rabbits for grub.

Q. Whereabouts was the lower-end stake at the southwest corner?

A. This is supposed to be the Monitor?

Q. Yes; that red line. What sort of a place was the southwest corner stake set in?

A. Stuck in a cliff of rocks which now is near the wagon road.

Q. Have you seen it since then?

A. Seen it this morning. It stands on the left as you come down.

Q. Did you help place it there?

A. I helped place it there myself with McConkey. Whether it is the same stake or not, it is the same kind of a stake and stands in the same place.

Q. How often have you seen that stake since then?

A. I have noticed the stake frequently here lately, since this suit came up.

Q. Where have you been living since 1875?

A. Up Henson creek, at what is called Pike Snowden's cabin.

Q. Since the toll road has been built that stake has been visible?

91 A. A man can ride along horseback and almost reach the stake. The stake is right up to the left coming down. There is now a cabin built right above it

Q. And with reference to that stake on the cliff of rocks, where did you place the other lower-end stake?

A. Well, I should think it would be placed over in here somewheres. It is close to where Mr. Crooke's hoisting works are now. It might be a little above the house. I couldn't decidedly tell now, because I have not seen the stake for some time.

Q. Do you remember seeing that stake after you and McConkey set it out?

A. I see it quite a number of times afterward. Although the trail run above, I have been down in there hunting, and noticed the stake.

Q. The trail ran above where the road is now?

A. Yes, sir.

Q. About how far below the old trail was that southeast corner stake put, as near as you can recollect?

A. Well, I couldn't tell. I should think close to the neighborhood of a couple hundred feet. It might not be so far.

Q. How did you fix the location of the stakes as to the place to put them? How did you measure the distance?

A. Stepped it, as near as possible. I didn't know of any tape-lines them days in the country.

Q. Were there any surveyors here then?

A. None as I know of. I don't think there were. I know all my leads I stepped off as near as possible.

Q. In the same way as this?

A. Yes, sir.

92 Q. Was the country quite new then?

A. It was pretty new.

Q. When did you come to this neighborhood?

A. I came through this country in 1872 first, came back in 1874, and I have been here off and on all the time since.

Q. Made it your home ever since?

A. Yes, sir.

Q. I will ask you in relation to the discovery notice, the notice on the stake at the discovery shaft.

A. I seen writing on it, but, as I have stated, I can't read or write. I would take it to be a discovery stake. McConkey has told me it was. We have pitched it out of the shaft; generally put it in the shaft when we quit of a night and next morning would throw it out.

Q. You don't know what it was, only it looked to be writing?

A .It was writing on it.

Q. When was that?
A. About the time I went up to help him do this work.

Cross-examination:

Q. At the last trial of this case you pointed out more particularly where the center stakes of that claim were placed, but first let me ask you where the discovery shaft of the Monitor lode is on that claim.
A. I should take it to be right in there.
Q. You say that you helped to set the side center stakes of that claim?
A. Yes, sir; 4 stakes.
Q. The distance was stepped off?
A. Yes, sir.
Q. And you aimed to get 150 feet on each side of the discovery shaft?
A. That is what we aimed to get. That is what he stepped for.
93 Q. Didn't you take the discovery shaft of the Monitor as the starting point to make the 150 feet—take it for the starting point and run 150 feet on each side of that discovery shaft for your side center stake?
A. We started from the shaft.
Q. And went 150 feet on one side?
A. Yes, sir.
Q. And then came back and started from the shaft and went 150 feet on the other side?
A. The shaft was supposed to be the center of the location; that is the way I took it, although I didn't know.
Q. Didn't you understand that the claim ran 750 feet in one direction and 750 feet in the other?
A. That is the way I understood it was located.
Q. Will you point out, taking that as the discovery shaft, where it was you put the side center stakes?
A. Well, I should take one stake to be here somewhere; it is in along here somewhere, and the other stake should be in along there.
Q. That is your recollection now of it?
A. Yes, sir.
Q. You and Mr. McConkey felt satisfied that you were not far out of the way of having the center stakes 150 feet each way?
A. Yes, sir.
Q. You aimed to do as best you could?
A. Supposed to set the stakes as near 150 feet from the center of the vein parallel with the sides.
Q. I wish you would mark about where on that map you set those center stakes.
A. Along in here, I should take it to be. It may be lower
94 and it may be up in there and it may be down in there. I should think it may be in here as near parallel with this center as we could.

Q. You understood the claim to be northeast and southwest.

A. Yes, sir.

Q. And then, as near as you could, you set those center stakes 150 feet at right angles on each side from that course?

A. Yes, sir; as near as we could.

Q. Did not the line between the 2 center stakes run along the side of the mountain instead of up and down the mountain?

A. I should take the claim down this way, running along on the west slope of the mountain.

Q. Will you point out, as near as you can, where the other side center stake was put?

A. It is parallel from the center of this as near as possible; it may be below and it may be above.

Q. In any event, it was intended to be 150 feet on each side of the center of the shaft?

A. Yes, sir; parallel with the vein.

Q. You spoke of Mr. McConkey showing you a stake somewhere up here?

A. If this represents it, it must be in here somewhere.

Q. You don't know what it was?

A. I don't, only what I was told.

Q. You understood in setting the stake in that direction that you were to set them 750 feet from the center of the discovery shaft?

A. That was what we proposed to do.

95 Q. This map was agreed to be on a scale of 40 feet to the inch. Do you think it was possible that you could have made a mistake in setting the upper stakes?

A. I didn't help set them.

Q. Do you think it was possible a mistake of 400 feet could have been made in setting the upper stakes?

A. I don't think anything about it because I don't know anything about it.

Q. Do you think you could very well have made a mistake of over 300 feet in setting the southwest end stakes?

A. We stuck them as near as possible—always aimed to get enough ground.

Q. Do you think it is at all reasonable or probable that you could make a mistake of 1 foot in 2?

A. We might and might not. It has been done.

Q. By drunken men, perhaps?

A. Pretty sober men have done it. We generally staked the leads to cover enough ground.

Q. When you ran 750 feet is it at all reasonable you could make an error of over 300?

A. We might in going down hill, because in some places it would be steeper than in others and we would step further.

Q. There was one thing that was intended to be done—to make the claim a parallelogram?

A. We aimed to set the stakes as near as possible parallel—side lines and also cross-lines.

Q. And, as near as possible, 750 feet one way and 750 feet the other?

A. Yes, sir.

Q. This was done in 1875?

A. Yes, sir.

96 Q. Did you work on the claim after 1875?

A. No, sir.

Q. You had no particular interest in the claim after that?

A. I merely worked there for a fellow named McConkey and Ernest.

Q. But after 1875 there was no reason why you should pay attention to the claim until you were spoken to about this suit?

A. After 1875 I have not been on the Ute hill much. In 1875 that was my main hill to get sheep and rabbits.

Q. After 1875 when was your attention first called to what you had done in 1875 and to your knowledge of the claim in 1875?

A. Well, I have often talked with Dr. McKenny, that was running the claim there with McConkey.

Q. I mean with reference to the stakes?

A. I have seen the stakes lots of times—that is, on the road.

Q. How long after 1875 was it before anybody spoke to you about the stakes—about wher ethe stakes were?

A. I think Mr. Bushnell, there, in 1881 spoke to me about it and asked me what I knew about it.

Q. That was the first talk you had that you recollect?

A. That was the first talk that looked to me like trouble. He merely asked me if I remembered anything about the location and the work being done upon it and its being staked off.

Q. Do you recollect having any talk with any one after 1875 until Mr. Bushnell talked with you in 1881 as to where the stakes of the Monitor claim were originally?

97 A. I don't remember that we ever talked about it. It might have been that we have. I don't remember. I remember after we put this stake over here I was passing one day and Mr. Mullin and his partners said they made McConkey pull this stake in, because it was setting on the Ulè ground—that this stake was first set in on their ground. Whether it was pulled in or not I could not say.

Q. Was it the southeast corner stake?

A. The southeast corner stake, next to the Ulè mine.

Q. When was this you had this conversation?

A. If I remember right, it was in 1875; late in the fall of 1875.

Q. They told you that they made McConkey pull that stake in because it was on Ulè ground?

A. Yes, sir; was lapped over on the Ulè ground.

Q. If that was the southwest corner the southeast corner would have been about there. That shows that it was over about 150 feet on the Ulè ground, so that if they made them move off the Ulè ground that would make the end line of the claim only 150 feet wide.

A. I don't know whether it was moved or not. I only know what they told me.

Q. And the next conversation you recollect was with Mr. Bushnell last year?

A. I think it was last year.

Redirect examination:

Q. To refresh your recollection I will ask you if you are
98 acquainted with Fred. J. Miller, that was out here in 1876 and 1877?

A. I think I know the man, but I don't know much about him. I know I had an introduction to the man.

Q. Do you remember anything about his talking to you in relation to the Monitor claim?

A. As I said before, I don't remember of talking to any man. No, sir; I don't.

Thereupon the defendants offered in evidence the original location certificate and an additional location certificate of the Monitor lode, offering the two instruments together.

The plaintiffs objected to the admission of the original location certificate for the reasons that—

1st. Upon its face it does not contain such a description of the claim as identifies it with reasonable certainty.

2d. It does not give such a description of the claim by reference to some natural object or permanent monument as will identify the claim.

3d. It is not a description of the claim that was located—in other words, if we take the description given in the original location certificate it bears no relation to the claim that was staked upon the ground as it has been proven by the defendants' witnesses.

Plaintiff asked the court to rule upon the sufficiency of the original location certificate at the time, but the court refused to rule upon it until the objections were made to the additional certificate, declaring that he will rule upon the sufficiency of both, both
98½ being offered at the same time; to which ruling of the court the plaintiff, by its counsel, then and there excepted; thereupon the plaintiff's counsel objected to the introduction of the additional location certificate, because it does not show the number of lineal feet claimed on each side of the discovery shaft, and also on the ground that it was incompetent and irrelevant; but the court ruled that the additional certificate refers with such particularity to the original that together they make a good certificate and overruled plaintiff's objections and admitted both certificates in evidence; to follow ch ruling of the court the plaintiff, by its counsel, then and

Q. Y xcepted.

A. I riginal and said additional certificate are hereto annexed,

Q. Wh spectively Defendants' Exhibits 1 and 2.

A. I first

Q. What w

A. To look

JAMES W. ABBOTT, being called for the defendants, testified as follows:

Q. You have already testified as to your profession and education. I will ask you whether you surveyed the Monitor lode for me in the summer of 1877?

A. I did.

Q. Will you describe to the court and jury the manner of the making of that survey and what was done in the making of it?

A. We went up here to the northeast corner and found a corner on the ground within ten feet of the Ute corner and on the end line of the Ute. Ulè then ran along on the end line of the Ute, 300 feet this way, and established another corner, then at a point
98¾ half way between. 150 feet from either one of their corners we started our center line and ran to the center of the discovery shaft; that was the center of the claim and the sides, 150 feet either way, on this line from that center; then we ran down from the center.

Q. Explain what was done there in reference to the stakes.

A. Nothing then. We started down in a direction parallel to these side lines here and finished out the 750 feet from these corners. We didn't put the stakes here, because the law didn't call for more than 6 stakes for a claim, but we put in a corner there and a corner here, 150 feet from the center. They are corners described in what is called the additional location certificate as corners 2 and 5; then I found this corner down here, the southwest corner, which is called in the additional location certificate No. 6. We found that; then we got the bearing of the line from here to there and the distance, and we put in corner No. 1, as described in the additional location certificate, at the same distance and with the same bearing from this corner 2 that 6 is from corner 5. We left this stake the same that we found and it is there to-day, as far as I know. I saw it a few days ago. We put in a new corner there for No. 1. We put in a new corner for No. 2. We left corner 3. We put in a new corner for 4 and 5. The corners that we put in new were all good substantial posts, hewed and marked with mounds of stone around them. We found a stake which is represented on the map
99 here and marked "Original northwest corner of the Monitor as staked." That corner was marked in such a way as to identify it to us as a corner stake of the Monitor. I took it to be the original northwest corner of the Monitor lode as staked, and I made an observation at that time, so that I could locate it on a map, and it is located on this map in its proper relative position with reference to corner 4. We found another stake here near corner as described in the additional location certificate, within 15 feet of what is designated in the additional location certifi[cate] corner 2. It is marked on the map "Original east-center M[onitor] as staked." We found another one, which I had reason to [believe] at the time—I don't remember how it was marked—was t[he] southeast corner of the Monitor as staked, and I ma[de] where it was, so that I could locate it on a map. Wit[h] Ulè 50 feet

these corners, I don't remember whether we put them in or not. I know we didn't number them. I don't remember whether we put in any stakes there; very likely we did; I don't remember positively about that. They were not numbered, at any rate.

Q. And as to the center stake on the west side of the Monitor, the original stake?

A. I don't remember about that; I haven't any notes of anything of the kind. Down there I did find one. There isn't any on there.

Q. What is that little mark there?

A. That is our post No. 5 that we put in.

Q. I will ask you whether the Ute and Ulè mines or lodes
100 were then patented or if survey for a patent had then been made.

A. It is my recollection that the patent surveys for those claims had not been made at that time, but were made within a short time afterward. The 3 claims were surveyed about the same time. The original surveys of the Ute and Ulè were made in 1876, as they were afterwards patented.

Q. By yourself?

A. By myself.

Q. I will ask you with reference to those lodes being very well-known lodes in this country.

A. Yes, sir.

Q. They were at that time?

A. Yes, sir.

Q. Regarded as perhaps the most valuable mines in the country?

A. Within a radius of 6 miles of Lake City, in that direction at any rate.

Cross-examination:

Q. You stated that you made a survey of the Monitor lode?

A. Yes, sir.

Q. At whose request?

A. Mr. Bushnell's.

Q. The defendant?

A. Yes, sir.

Q. What time did you say you made it?

A. My recollection is June 14th, 1877.

Q. How many stakes did you find standing?

A. 1, 2, 3, 4, 5 (counting them).

A. 1 The southeast corner stake you found there?

follows: Yes, sir.

Q. Y[illegible]Where did you remove it to?

A. I a[illegible]he point mentioned yesterday as corner one of the Moni-

Q. Whe[illegible]r.

A. I first a[illegible] Under whose directions did you move the southeast cor-

Q. What w[illegible]ake from that point to that point?

A. To look [illegible]hnell told me to make this the southwest corner, as we

found it; so we put that stake over there in order to make that end symmetrical with that end.

Q. State if, as those 2 stakes stood at the time you made the survey, the Monitor included what is known as the Rachel discovery shaft.

A. No, sir; the line between these 2 stakes was above the Rachel shaft.

Q. Under Mr. Bushnell's direction the lines were so run as to include the Rachel discovery?

A. Yes, sir.

Q. The stake you found at this point, what did you understand it to be?

A. I understood it to be the east center.

Q. If that was the east center stake originally how far removed was what was called the east center stake when you were called upon by Mr. Bushnell to make the survey?

A. The distance on that map is 430 feet, approximately, from those 2 points.

Q. Then if the east side center stake was placed at that point at the time the Monitor was originally staked, when you were called upon to survey it you found it removed 430 feet?

A. Taking that premise, that would be the conclusion.

Q. If this claim was originally located running 750 feet northeast from the center of the discovery shaft, show to the jury where the northeast corner stake ought to have been.

102 A. That point up there, which is marked "northeast corner of the Monitor, as described in original certificate."

Q. Where should the northwest corner stake have been?

A. At this point, marked on the map "northwest corner of Monitor, as described in original certificate."

Q. Upon the premise that the Monitor claim was described and located as running 750 feet northeast of the discovery, state to the jury how far you found what was called the northeast corner stake, when taken upon the ground by Mr. Bushnell, from where it ought to have been under the description given in the original certificate?

A. About 500 feet.

Q. Then if the northeast corner stake, as described in the original location certificate, should have been put at that point, you found it, when taken upon the ground by Mr. Bushnell, 500 feet out of position?

A. Yes, sir.

Q. If the northwest corner stake, as described in the location certificate, should have been at that point, how far removed from th[illegible] point did you find what was called the northwest corner stake taken upon the ground by Mr. Bushnell?

A. It measures on the map 490 feet.

Q. Is that the correct distance?

A. Yes, sir.

Q. Then you found the northwest corner stake remo[illegible] proper position 490 feet?

A. Yes, sir.

Q. Where did you place what we will call the west side center stake when you made the survey?

103 A. The point that is described as No. 5 in the additional location certificate.

Q. If the west side center stake was placed at about that point, as stated by Mr. Snowden, how far from where it was originally placed did you place it when taken upon the ground by Mr. Bushnell?

A. About 340 feet.

Q. Then if that would be the proper position for the west center stake as the claim was described on the original location certificate, you, under the direction of Mr. Bushnell, placed it 340 feet away?

A. Yes, sir.

Q. You stated your recollection to be that at the time you made this survey for Mr. Bushnell the official survey for patent of the Ulè claim had not then been made?

A. That is my recollection. It is easily verified.

Q. So that at that time the Ulè claim was simply located and staked upon the ground as another claim, in which no steps for a patent had been taken?

A. The Ulè claim had been accurately surveyed.

Q. It was the survey made for the location?

A. It was the survey made for the amended location certificate.

Q. Then, as directed by Mr. Bushnell, you made a survey at that time of the Monitor claim which included so much of the Ulè claim as I pass this pointer around?

A. Yes, sir.

Q. That location included a part of the Ulè vein, did it not?

A. Well, the corner came inside of the Ulè ground. There was no intention of taking the Ulè vein. The location of the

104 Monitor overlaps the location of the Ulè.

Q. I will ask you if you have marked upon that map lines which show the proper location of the Monitor claim as it is described in the original location certificate—that is, running 750 feet northeast from its discovery shaft and 750 feet southwest from its discovery shaft?

A. These double green lines beginning at a point labeled "southeast corner of the Monitor as described in the original certificate."

Q. Run with your pointer over it.

(Witness indicates it.)

Q. As the claim is described in the location certificate, taking its discovery shaft as the starting point, that is the correct location of that claim with reference to all of the neighboring claims?

A. Yes, sir.

follows And you put those double green lines there to indicate and

Q. Yhat location?

A. I an s, sir.

Q. When o whether the 5 stakes that you say you found there, there,

A. I first a and there were where they were originally placed, have

Q. What wa wledge?

A. To look a at all.

Q. All you know about it is that you were called upon by Mr. Bushnell to go and make a survey of the claim, and you found, when you went upon the ground with Mr. Bushnell, these stakes that you have mentioned?

A. I did.

Q. How they came there originally you have no knowledge?

A. None at all.

105 Redirect examination:

Q. Mr. Patterson asked you whether by my direction you placed the southeast corner stake of the Monitor by your survey upon Ulè ground. I will ask you whether or not it was my direction to you that you retain the original stakes of the Monitor as near as you could and make a survey according to Government rules for the location of the lode.

A. We intended to make it 1,500 feet in length, but when we got down to there it was only some 616 feet, and we had to set this corner stake inside of the Ulè ground.

Q. The only object in putting the southeast corner on Ulè ground was to make a symmetrical survey according to Government rules?

A. Yes, sir.

Q. I will ask you whether there was any pretense that we claimed an inch of Ulè ground.

A. On the contrary, I know there was nothing of the kind.

Q. Will you point out the original discovery shaft of the Rachel?

A. "A."

Q. That is on Ulè ground?

A. It is.

Q. Those black lines indicate the Ulè ground?

A. There is no question but that the discovery shaft of the Rachel was within Ulè territory.

Q. So that in extending the lines to include that there was no pretence of claiming anything on the Ulè ground?

A. On the contrary, I knew you did not intend to claim the Ulè or any portion of it as such.

Q. Will you indicate, Mr. Abbott, with your pointer where
106 the side lines of the original Monitor location, as indicated by the stakes you found on the ground, would run, preserving a distance of 150 feet each side of the vein, as near as you can judge?

A. I don't understand that question.

Q. As indicated by the marks that you have drawn from the stakes you found on the ground when you went there to make the survey, will you pass your pointer over them?

A. Yes, sir.

Q. Do those lines include the original Monitor discovery shaft?

A. Yes, sir.

Q. Will you indicate where those lines would be if you preserve, as the original location certificate requires, 150 feet side of the vein of the Monitor as we supposed it to be made that survey?

A. The only answer I could give to that question is that the assumption, I suppose, must have been that your vein run through the center of the claim as staked.

Q. But if you throw this line out 150 feet and bring this line in so as to be only 150 feet from the discovery shaft, where would it then be; where would that bring those 2 lines?

A. You mean take a line parallel to this line?

Q. I mean these lines drawn between the original stakes as we found them would come pretty close here to the Monitor shaft, and at that point is not 150 feet from the discovery shaft.

A. Yes, sir.

Q. And this line is more than 150 feet from the discovery
107 shaft?

A. Yes, sir.

Q. Now, the original location certificate calls for only 150 feet on each side of the vein. Carrying this line out 150 feet and this line in, so as to be 150 feet from the discovery shaft, where would that bring those 2 lines?

A. Any line that is 150 feet from the discovery shaft must pass through that point indicated there and the other through this point.

Q. So that bringing these lines through those points they would be identical with those red lines?

A. Yes, sir; they become those red lines.

Q. And, taking it all down through the location, you may state whether or not it was the design and intention in making that survey to make the boundaries just 150 feet from where it was supposed that the Monitor vein ran.

A. I could not tell what was in your mind at the time. My intention was to do what you wanted me to do.

Q. As indicated by the stakes we found?

A. Yes, sir; I think so. It was the design to make it a symmetrical figure, making the corners we established as near as possible identical with the stakes we found.

Q. And to take in no ground except what was necessary to do that?

A. So far as I know, that was the intention.

Q. On yesterday you said you were not certain whether we put stakes at that sharpest angle of the Monitor at the exterior lines at the time of making that survey?

A. Yes, sir.

Q. To refresh your recollection I will ask you whether on
108 your examination at the former trial you did not testify we did place stakes there.

foll It is an easy matter to determine. If I so testified I found it ny notes. I don't remember now.

Q

A. ecross-examination:

Q. W

A. I ha ave stated to the jury that if lines were run between the

Q. Wha found them upon the ground when Mr. Bushnell took

A. To lo

you there that the claim as indicated by the red lines would have been the claim.

A. Yes, sir.

Q. If that would be the claim (indicating on the map)—as you found the stakes—state how close the east side line would come to the discovery shaft.

A. The nearest point seems to be about 275 feet.

Q. Did you ever suppose that the Monitor vein, taking the discovery shaft as the starting point, would run down through the center of that claim as you surveyed it?

A. I would hardly like to testify with any positiveness what I did suppose at that time. We did not undertake to follow the lode a step beyond that point.

Q. I will ask you, if the simple object was to make the claim symmetrical without interfering with other rights, whether or not the southwest corner stake might not have been moved up a sufficient distance to have entirely excluded the Rachel discovery shaft, though it was upon Ulè ground, and so as not to lose a particle of the vein, if that was the vein.

A. Yes, sir.

109 Q. Do you recollect whether the Rachel claim at that time was staked?

A. Yes, sir.

Q. Did the Rachel discovery shaft then have its discovery stake at the shaft?

A. I don't know anything about that.

Q. It was evident at that time that there was a claim located with that point as its discovery shaft?

A. It was a well-known fact.

Q. At the time that the line was run so as to include the discovery shaft, was the Rachel an abandoned claim?

A. It was not. It could not have been an abandoned claim for another year.

Q. And notwithstanding that fact the line was so run as to include the Rachel shaft?

A. The exterior boundaries would include the Rachel shaft.

The defendant-, by *his* counsel, then offered in evidence the following instruments, to wit:

A quitclaim deed from Phillips to McConkey of an undivided $\frac{1}{4}$ in the Monitor lode, which deed is hereto annexed, marked Defendants' Exhibit 3; to the admission of which in evidence the plaintiff objected on the ground—

1st. It is a certified copy, and no ground has been shown for [illegible] introduction of the certified copy.

2nd. It does not show that the official seal of the probate [illegible] of Hinsdale county, before whom it was acknowledged, would [illegible] tached.

A deed from McConkey to Clark of an undivided [illegible] Ulè
110 in the Monitor, hereto annexed and marked Defe[illegible] 150 feet
hibit 4; to the admission of which in evidence

objected; and also then made the same objection to the preceding deed, because there is nothing in the deeds to identify the property in dispute. They do not describe the lode they purport to convey, nor do they refer to any instrument which does purport to describe them.

Deed from McConkey to Clark of ¼ interest in Monitor, hereto annexed, marked Defendants' Exhibit 5; to the admission of which the plaintiff objected on the ground that it contained no description of the Monitor lode, nor does it refer to any instrument which does contain a description.

Deed from McConkey to Miller of ¼ interest in Monitor, hereto annexed, marked Defendants' Exhibit 6; to the admission of which the plaintiff objected on the ground—

1st. It does not show that the notary public before whom it was acknowledged attached his official seal.

2nd. It is a certified copy, without any reason shown why the original is not here.

3rd. It contains no description of the claim it purports to convey, nor does it refer to any instrument that does contain a description.

Deed from Clark of an undivided ⅛ interest in the Monitor to each of defendants except Miller, hereto annexed and marked Defendants' Exhibit 7; to the admission of which the plaintiff objected on the ground that it did not contain a description of the premises and because there was no proof of the authority of the person before — it was acknowledged to take acknowledg-
111 ments, there being no certificate from the proper officer attached.

Deed from Joseph Bocke to A. A. Bocke, hereto annexed, marked Defendants' Exhibit 8; to the admission of which the plaintiff objected, on the ground that it was a certified copy and no reason was shown why the original should not be introduced.

The defendants offered in evidence all of the foregoing instruments at once, and the plaintiff, by its counsel, made specific objections to each one of them, as above stated, and requested the court to rule upon those objections as they were offered and to determine whether or not each should be admitted when they were offered, but the court refused to determine the objections to each and all of the instruments as they were made, and thereafter overruled the plaintiff's objections and admitted all of said instruments in evidence; to which ruling of the court the plaintiff, by his counsel, then and there objected.

A. R. Bushnell, one of the defendants, being sworn, testified as follows:

Q. You are one of the defendants in this case?
A. I am.
Q. When did you first come to San Juan?
A. I first arrived here in May, 1877.
Q. What was the object of your visit then?
A. To look after this mining property—the Monitor lode—and

some other claims that myself and others for whom I acted had here.

Q. You may state what you did relating to the Monitor
112 lode.

A. This was the principal property that we were interested in, as we considered it, and the chief object of my visit. I went upon the ground and examined it at many different times. Mr. McConkey was here at that time. He went with me upon the ground once or twice.

Q. The original locator?

A. The party from whom we purchased. McConkey and Phillips were the original locators, and Phillips had sold out to McConkey. McConkey was here, and I think he pointed out to me the original stakes. There were at that time all of the stakes standing. The original stake, beginning here at this point of rocks, was standing there, marked as the southwest corner stake, I believe. It was marked properly, so far as I could judge, at any rate.

Q. What marking was on it?

A. Well, it was Monitor lode southwest corner stake, I think.

Q. Was that on the inside or outside?

A. On the inside, towards the lode. It was either hewed or the bark peeled off the stake, so as to make a smooth surface. There was a stake standing at this point marked as the southeast corner stake. The Uncompahgre toll road runs along here, and it was a little above, perhaps 75 feet, I should judge, perhaps not as far, above the toll road. I think perhaps not as far as that; and that was marked as the proper stake of that corner. There was an orig-
inal stake standing here for the east center side line, so
113 marked, of the Monitor lode; the same stake was there last spring. I saw it day before yesterday. It was standing by a log and the log had been thrown down the hill, and the stake had fallen down. I replaced it as well as I could conveniently, having nothing but my hands to work with. There was an original stake here, marked as the northeast corner stake, hewed on the side towards the lode. There was an original stake here, about as near that point as I can tell, also marked, and there was an original stake about this point. It is 62 feet, as near as I can judge, down the mountain, and perhaps a little inside of this line—I don't know as any inside of the line—62 feet from this corner of the Monitor lode, as surveyed by Mr. Abbott, from where the west side center stake was put by Mr. Abbott when I had him survey it in June, 1877. Those were pointed out to me as the original stakes. I never doubted but what they were.

Q. Pointed out by whom?

A. I am not certain whether Mr. McConkey pointed them all out to me or not, but he pointed out a portion of them.

Q. What did he point out to you?

A. I think he pointed out all of them, except it might be this one, the northwest. I could not say positively whether he pointed that out to me or not.

Q. Did any one ever point that out to you?

A. Yes, sir; Mr. Miller, another of the defendants. He pointed that out to me, and I don't know whether he informed me
114 McConkey had pointed it out to him. I remember distinctly his pointing it out to me, going with me to it, and I won't be certain whether I had ever been to it before or not.

Q. What did you do?

A. I had some work done in the Monitor discovery shaft.

Q. When?

A. In 1877.

Q. What time?

A. In June, I think. That season I had some $200 worth of work done.

Q. Who did that work?

A. Peter Robertson and his partner did $150 worth of it, and other parties. I paid Mr. Abbott for surveying. My estimate would include Mr. Abbott's surveying.

Q. What were those other parties doing?

A. Tracing the vein, endeavoring to satisfy ourselves where the vein ran.

Q. Whom did you have for that work?

A. Mr. Robertson assisted me, and John Carmody.

Q. Who is he?

A. He was a miner here, a boy that came from Lancaster. I knew him there and fell in with him here, and we looked over the ground together.

Q. What was his reputation here for prospecting?

Objected to and waived.

Q. In what capacity did you employ Mr. Carmody?

A. As a miner having had experience.

Q. What was done by Mr. Robertson and Mr. Carmody pursuant to your employment of them for that purpose?

Objected to by plaintiff. Objection overruled, and plaintiff excepts.

115 A. I would say that my recollection is that Mr. Blunt also assisted us part of the time, then Mr. Robertson's partner. Mr. Carmody and Mr. Robertson were not together at the same time. Carmody was entirely independent of what Robertson did, and at different times.

Q. But during that summer before you had your survey, was it?

A. Yes, sir; we looked over in company the ground from the Monitor discovery shaft down through this direction clear down to the lower end stakes of the Monitor, or where we judged the lower end would come, and found that there had been some old cuts which they cleaned out partially——

Objected to by plaintiff.

—and along down through here, and they did some surface work,

making some little, not very deep, excavations, but so far that they expressed themselves satisfied.

Q. What did you do pursuant to that with reference to your survey?

A. After ascertaining as near as I could where the vein ran and where the stakes were, I employed Mr. Abbott to make a survey and gave him instructions to make the survey, retaining the original stakes in their position, as far as it could be done, and make the survey according to Government rules—that is, make the boundaries symmetrical, as the rules of the Government surveyor's office require—and this northeast original stake was retained exactly where it originally stood, and the southwest and the balance of the survey to correspond.

116 Q. That southeast corner stake that appears on the Ule ground, state how that was placed there.

A. I did not know anything about Government rules of surveying, except so far as Mr. Abbott informed me, and I recollect distinctly his telling me that it would be necessary to put it there. I was disposed not to have it there. I did not want to go down on the Ulè ground, but he said that made no difference; that it was only to fill out the boundary, make the figure symmetrical, and it would be proper and right to place it there. My recollection is that the survey for a patent had then been made, and that the application for patent on those mines was then pending. I think they were patented together, but I may be mistaken about that.

Q. Did you or not make claim to any portion of the surface of the Ule lode?

A. Not an inch of it; never thought of it.

Q. Did you make any claim to that shaft at "A"?

A. Never the slightest; in fact, I knew it was on the Ulè ground, and Mr. Lewis Crooke was here then representing the Crooke Mining Company, I think. I don't know whether John J. was here or not. I went to Mr. Lewis Crooke and asked leave of him to run in from below here on their surface ground to develop this vein—the Monitor vein—in 1877, and he informed me that they would not allow anybody to come onto a foot of their ground. He refused the application.

Q. Did he say anything about that "*a*" shaft at that time?

117 A. He informed me that nobody had any right to it; that they had bought all the ground within their surface lines, and that that Rachel discovery shaft—the parties claiming it had no right to it at all—it was on their ground and they bought all there was in their ground.

Q. Do you know whether the Ulè was a located claim prior to the Rachel?

A. I knew from the records that it was. I examined the records at that time and took memoranda of the location of the Ulè and of the Ute and Rachel and Monitor and all the lodes around there that I could find a record of that I thought by any possibility could interfere with the Monitor. I think the original memorandum is in those papers or somewhere else about here.

Q. You may state any other matters that occur to your mind as of interest to either of the parties in this suit.

A. I don't know that I think of anything further. There is one other point—that is, as to another lode that don't appear here, that was then located across the Metropolitan. The discovery shaft of it was right in there at the inner angle of this elbow of the Monitor; that was one of the location certificates that I copied—I think I copied that, I am very certain I did—that is, the descriptive portion of it.

Cross-examination:

Q. You were examined last term with reference to your having the lines of the Monitor run?

A. Yes.

118 Q. You were explicitly asked with reference to changing the southeast corner stake as you found it so as to include the Rachel shaft?

A. I think I was.

Q. Do you say you had a talk with Mr. Crooke before these lines were run?

A. No, sir; I don't say it was before; I am not certain whether it was before or after.

Q. Don't you know the Crooke Mining and Smelting Company did not own the property at that time?

A. The smelting works were running and they were in possession.

Q. Did you testify at the last trial anything about a talk with Lewis Crooke?

A. No, sir; just upon that point I answered that I made inquiry and ascertained as nearly as I could what were the rights of the Rachel boys there, and from the best information I obtained I thought they had no rights there. I have not stated by any means all the inquiries I made.

Q. You know Lewis Crooke, don't you?

A. I am not very much acquainted with him.

Q. You know he is not here?

A. I don't know whether he is or not. I presume he is not.

Q. Could you not have made your claim symmetrical without taking in the Rachel shaft.

A. Yes, sir; I presume so. Still we preferred to have our claim as nearly 1,500 feet as we could legitimately get it.

Q. And yet if you had removed the southwest corner stake and left that standing you would still have had 750 feet south-

119 west of the discovery shaft, which is all that is called for in the original location certificate. Isn't that true?

A. Yes, sir; I presume it is.

Q. But your preference was to move your southeast corner stake and bring it further down instead of moving your southwest corner stake?

A. Yes, sir; it might have been controlled by some other reasons—that is, that stake was on the point of rocks where it could not very

well have been moved or its location mistaken. The other one was above the road, at a point where it was said by Mr. Simons and others that the southeast corner stake had been moved. Nobody claimed, that I could hear, that the other had been moved. I talked with Mr. Simons and others and at the time I could not learn that anybody claimed that the southwest corner stake had been moved, and I desired so far as we could to retain the original stakes and make our ground conform to surveyor's rules.

Q. Will you state just what work has been done on the claim since you owned that claim and what the work consists of?

A. In 1877 I had the shaft, I think, sunk some deeper.

Q. About how much?

A. I cannot tell, but a few feet; not very many; I couldn't state how many.

Q. 5 feet?

A. It might be in that neighborhood or it might have been 10 or 15; I couldn't tell; I should think not so much, because I didn't expend money enough to pay for it, and had a drift run from the bottom of the shaft up the mountain.

120 Q. How much of a drift?

A. Well, it is my recollection that that was 10 or 12 feet, but I might be mistaken about that. Mr. Robertson would know better than I. The survey and tracing of the work was done.

Q. What excavation was done?

A. There was some excavation—a very little in this shaft at the upper end of Monitor—done in 1877, but nothing to amount to much. What was done was rather for the purpose of seeing what sort of a vein there was there than anything else—with a view to that rather than sinking it any deeper or drifting any, and there was some work done in partially cleaning out the old cuts to trace the vein. That is my recollection.

Q. What in 1878?

A. In 1878 Mr. Bock came out here. I only know from information from him what work he had done. My information was that he simply had the annual labor done in 1878, and in 1879 Mr. Bock was here also.

Q. Assessment done then?

A. Assessment done in 1879 and survey made for a patent. The application for a patent was commenced in 1879. At that time we agreed that we would have the lode patented and develop it as soon as we could get it patented.

Q. What did you do?

A. We went on and made application for the patent in addition to the annual work; that is all.

Q. In 1880?

A. In 1880 there was only the assessment done, so far as I know.

121 Q. In 1881?

A. In 1881 there was only the assessment work done—full assessment, so far as I know.

Q. In 1882 did you do any other work except stripping the ground for the purposes of the suit?

A. That is all that I know of. The adverse suits were commenced, which prevented our developing as we had intended and agreed on.

Q. The defendants are the owners of the claim?

A. Yes, sir.

Q. Where do they live?

A. A portion of them live in Wisconsin and the rest in Chicago. Mr. Miller last term was contemplating going to Boston, but I think he did not go.

ZENOS SNOWDEN called for defendants:

Q. Do you know what work was done on this mine in 1875?

A. I know that I helped sink a between 10- and 11-foot shaft.

Q. In 1876 what work was done?

A. I can't say whether there was work done or not. There was work up there, and Mr. McConkey said they were working on it. I know the shaft was deeper.

Q. How much deeper?

A. I should suppose it was sunk between 25 and 30 feet—might be deeper. I know the shaft was considerably deeper. Mr. Flora and Mr. McConkey were up there at the time said to be working.

Q. What was the character of the vein as to mineral?

A. When I worked in it it showed some galena, iron, 122 pyrites of copper and some zinc.

Q. Are you an old prospector and miner?

A. Been at it a good while.

Q. How long?

A. Off and on, most of my life.

Q. What is your age?

A. I am about 38.

Q. Spent most of your life in mining?

A. Yes, sir.

Q. What would you say as to this vein carrying any silver?

A. I should call it indications—what we all go on in this camp. I would call it a fair vein—a good prospect.

Q. As to its being a silver-bearing vein?

A. Yes, sir; I should take it to be that. It carries more or less iron, zinc, copper, and galena.

Whereupon the defendants, by their counsel, offered to rest the case of the defendants, with the understanding that if the course of their vein through the center of their claim should be attacked by the plaintiff on rebuttal the defendants should have the right on surrebuttal to prove the existence of their vein substantially through the center of their location of the Monitor, and further stated to the court that the position of the defendants was that they should not be required to show affirmatively the course of their vein down through substantially the center of their surface ground until it was ascertained

whether the plaintiff would attack its so running, and that the defendants might be permitted to introduce testimony to repel
123 such an attack after it was made, if it should be made, and not before.

By the COURT: You can pursue your own course. The court rules upon just such questions as are properly presented for its decision, and not in advance of the time that they are presented.

Whereupon the defendants, by their counsel, excepted to such ruling of the court and proceeded to introduce further testimony, as follows:

WILLIAM BORIE, called for defendants and sworn, testifies as follows:

Q. Where do you live?
A. Lake City.
Q. How long have you lived there?
A. About 5 years.
Q. What is your business?
A. Mining.
Q. Are you a prospector, too?
A. I have done some prospecting; mining most of my time—about 13 years.
Q. Where have you mined and prospected?
A. Gilpin county, Clear Creek, some in Park county, Hinsdale, a little in San Juan, Silverton.
Q. Have you ever been over the ground in controversy—the Monitor claim?
A. Yes, sir.
Q. The openings of the Annie claim?
A. Well, I have been to some of them; yes, sir.
Q. When were you first there, upon what is known as Ute hill?
A. 1876.
Q. Have you been there frequently since?
A. Yes; I worked there in 1876 and in the winter of 1877, on the Ute. I worked on the Ulè in 1876 and on the Ulè in 1878.
124 Q. Have you ever examined any of the veins coursing down that Ute hill with a view of ascertaining their course?
A. Yes; some.
Q. What veins have you examined?
A. The Monitor, I guess, most closely.
Q. Point out to the jury what examination you have made of the Monitor and where it takes its course, in your opinion as a miner.
A. It comes right along here down to this hole here.
Q. In which end of that long cut, "O," does it appear?
A. In the east end.
Q. And does it unite, in your opinion, with what they call the Annie vein?

A. Yes, sir; I think it does down here a little ways, but it is not uncovered enough along there to tell where it comes in.

Q. From there what is its course on through from where it unites with the Annie vein?

A. I think they both run together right along in here. It can't be seen; it is not uncovered enough to tell exactly.

Q. When were you last on the ground?

A. Day before yesterday.

Q. State what you then saw exposed of this vein.

A. From right at the edge of the dump coming along down here and along that line to a little hole here, and then there is a hole where it shows the vein, and the next place in here, "O," we found the vein, quartz and a little mineral.

125 Q. Can you walk on quartz continuously from the foot of the dump down to that point you speak of, the end of that line?

A. Yes, sir.

Q. State to the jury what sort of a shaft there is at what is called the Monitor discovery and if you know anything about its dip and depth.

A. It dips in that shape to the north or northwest.

Q. Dips into the mountain as it comes down the hill?

A. Yes, and the vein lays kind of flat along here as it comes to this here streak. There was a streak standing her-; it is out now, I believe. It shows up the vein a good deal better than it did at the last trial.

Q. How wide is the vein at the point where the roots of that tree are still standing?

A. 4 or 5 feet.

Q. How wide is the vein in the Monitor shaft?

A. Where you can see it on the surface, I should judge it was about 4 feet or 4 & ½; maybe a little larger.

Q. How deep is that shaft?

A. I never measured it.

Q. Did you ever look down the shaft?

A. Yes.

Q. How deep would you judge it to be? Is there any water in it?

A. Yes.

Q. How deep is it from the top to the water?

A. I should judge 30 feet.

Q. Can you state in degrees about what the dip of that vein is from the perpendicular?

A. Between 25° and 30°, I should judge.

Q. You don't know what the dip would be from the horizontal?

A. I do not.

126 Q. Well, you may state, in your opinion as a miner and from the experience which you have had in such matters, what would be the course of the vein in running down that perpendicular hill with the pitch that it has as disclosed in the shaft?

A. I think that would bring it right down this here.

Q. How well satisfied are you that the vein exposed in the Monitor shaft is the same vein that you find in the east end of that long cut "O" and which you say unites and *and* joins with the Annie vein?

A. I have no doubt at all.

Cross-examination:

Q. Did you testify on the last trial of this case?

A. Yes, sir.

Q. Do find any continuation of this vein—that is, the part of it you find exposed along in this direction—beyond where it crosses this mark here through a shaft that is called the Enterprise shaft?

Objected to by defendants as not cross-examination. Objection overruled and defendants except.

A. Well, there is a part of it apparently running off in that direction.

Q. A part of this vein?

A. A small portion of it.

Q. Would not you as a miner, standing upon this crossvein at about that point and following it up in its course through the Enterprise shaft, say that this vein there continues on into that shaft and beyond it?

127 A. If I didn't see any of this part of it I might say so.

Q. Is there not along here disclosed in the cut a well-defined ridge with a sort of an oval top, which is the top of the vein?

A. I think there is.

Q. Does not that oval ridge continue unbroken without being broken into or disturbed right on its course clear through that Enterprise shaft?

A. It is the largest, I think, right here.

Q. I agree with you that there is more mineral disclosed there. Isn't that true?

A. Yes, sir.

Q. But is there not about the same sized ridge and about the same quantity of quartz disclosed at that point that there is disclosed there?

A. No, sir; I don't think it is as large.

Q. Is not what is disclosed there larger than what is disclosed here?

A. Yes, sir; right there.

Q. But is not what is disclosed from that point on to the Enterprise shaft more nearly the size of that than what is disclosed there?

A. I think not.

Q. Did you examine it with reference to determining it?

A. Yes, sir.

Q. Is not the vein as disclosed in this shaft just about as straight in line as it is marked on that map?

A. Yes, sir; that portion of it.

Q. When you come to this point don't you have to make a turn and don't you get off the line of the vein that runs through the Enterprise shaft?

A. Yes, sir; we get off that line, but the biggest part of the
128 vein is here.

Q. You think this is a split here?

A. I think there is a split there.

Q. But yet when that part and that come together it is smaller after the junction than it is in only one prong of it?

A. Yes, sir.

Q. Did you go down along in that direction?

A. No, sir; I did not this time. There were some men working right there.

Q. Didn't you go down there?

A. Not the last time I was there.

Q. You don't know what is disclosed there?

A. Not just at that point.

Q. You didn't go down 35 or 40 feet below?

A. No, sir.

Q. Do you find a vein down about here?

A. There is some quartz.

Q. Between here and there you have not been?

A. No, sir.

Q. You say that this is the Monitor vein?

A. The main part of it; what I can see.

Q. Don't you arrive at that conclusion partly in ignorance of what is below?

Thereupon the defendants objected to all questions relating to the course of the vein indicated on the map as running down to a junction with the Ulè as not cross-examination. Objection overruled and defendants except.

A. Yes, sir; all of it.

Q. We will come to this lower part of it where it enters or
129 is disclosed at the working "O." You say that you think that the vein that is disclosed in the last pit there is the same vein you see disclosed there?

A. Yes, sir.

Q. There is no working between there and there?

A. No, sir.

Q. Because you find a vein there running in this direction and in that a vein apparently coming from that you believe that what is disclosed there is a continuation of what is disclosed there?

A. Yes, sir.

Q. When you were there did you examine some late stripping that had been done down below that stripping—below "*e*" and "*f*"?

A. I saw some, but did not examine it.

Q. Didn't you see in the line of this vein a crevice which was apparently a continuation of that vein upon the other side of the Annie?

A. No, sir; I did not. I looked there and didn't see it. It was not uncovered sufficiently to determine.

Q. You were asked whether this vein unites with what is called the Annie vein. You say you think it unites with the Annie vein, but you are not certain, because it is not sufficiently uncovered?

A. Yes, sir.

Q. You say you examined the Monitor discovery shaft?

A. Yes, sir.

Q. Did you examine the dump—the rock on the dump?

A. I don't think I did this last day I was up.

Q. Did you examine the Monitor discovery shaft sufficient to enable you to determine whether what was on top of the dump was what was taken from the vein lower down?

130 A. I think I did.

Q. Does not the dump disclose the common country rock, with small threads of quartz running through it?

A. There is some of it that way.

Q. Did you see any great lump of quartz there that indicated they had gone down to any great body of quartz?

A. I did not look.

Q. There is a sort of decayed log cabin over the Monitor discovery shaft?

A. Yes, sir.

Q. Doesn't that cabin stand square with the course of the vein at that point?

A. I don't think it does; I think it is kind of catty-cornered.

Q. Don't you think that the log building over the Monitor discovery shaft stands at an angle on the claim with this vein here?

A. With this smaller vein?

Q. Yes, sir. Do you say it stands at an angle so as to come square across that way?

A. No.

Q. Does it not stand so on the claim that it would be just about square over that part of the vein and at an angle to this vein?

A. If I recollect right, I don't think it stands quite that way. I think it stands a little more that way, as I recollect it.

Q. Did you notice the shaft—did you look down into the shaft for the purpose of getting the strike of the vein?

A. Yes, sir.

Q. Didn't they sink down perpendicular for about 15 or 20 feet?

A. I think they did, very near.

Q. Until they came to the foot wall, and then didn't the
131 shaft continue down on the foot wall? Did you examine the face of the foot wall as it dipped into the mountain down where it is first seen in the discovery shaft to see which way its course was?

A. I think I did.

Q. Let me ask you, if the course of the vein as shown by the foot wall when it is reached was carried out on its course would it not run across that vein there?

A. That might be the way it is broke. I think the dip would run it off in that direction.

Q. Leave this vein and go on up into the Monitor discovery shaft. Does not the course of the Monitor as disclosed by the foot wall in the Monitor shaft run just down in that direction and not until it gets there is there any apparent turn in the vein?

A. I couldn't say for certain how far it runs down that way.

Q. Upon the theory that this down here is really the Monitor vein, I will ask you if the foot wall as disclosed in the discovery shaft does not seem to have a course right down in that direction.

A. It may have.

Q. Did you examine the Annie vein up in this direction?

A. I did not the last time I was up.

Q. Did you examine the working there to see whether or not there was another vein at that side?

A. Yes, sir.

Q. You saw a vein at that side of it and this vein coming in there?

A. Yes, sir.

Q. So that evidently there are two veins?

A. I should judge there are two veins there.

Q. Whether this vein crosses the Annie you are not pre-
132 pared to say?

A. No, sir; but they are so close together I should judge they run together.

Q. You are not prepared to say that this does not continue on its course and cross the Annie?

A. Not for certain.

Q. At the last trial of the case, when you were up there for the purpose of testifying, there was a great deal of work you discovered now that was not done then, was there not?

A. Yes, sir.

Q. Did you ever go to these shafts that are marked "*r*" of the Monitor and "*a*" of the Monitor and that Ulè working there?

A. Yes, sir; the last term of court.

Q. Didn't you discover then in that shaft "*r*" a vein?

A. I don't recollect what I did see up there then, but I know there was a good deal of quartz.

Q. Did you discover in "*a*" a vein?

A. I think there was quartz in there.

Q. Didn't the examining of those shafts indicate that there was a vein running through them down in that direction?

A. Yes; and I think there was another running off in that direction.

Q. But there was no stripping done—no shafts sunk?

A. No, sir.

Q. Simply saw some evidences of quartz?

A. Yes, sir.

Redirect examination:

Q. I will ask you about this vein down here that counsel has cross-examined you on. I don't think that you understood
133 the question that was put to you. Day before yesterday were you not down on this vein in company with myself at this point where they had a flag stuck up?

A. I was thinking that this here was the place.

Q. You were down on this vein?

A. If that is the one.

Q. You don't express an opinion as to the Monitor vein coursing down here in ignorance of what is exposed on that vein?

A. No, sir; I recall that.

Q. With reference to this black mark you were asked by counsel if it was not your opinion—if you knew that the Monitor did not cross here at this point. I will ask you now if it is opened so any one can tell where it does run?

A. No, sir; I don't think it is.

Q. From all indications that are there on the ground, what would you say as to its crossing the Annie or uniting with it?

A. I should say it would come into the Annie vein and probably run with it.

Q. There is no opening and nothing to show it crosses the Annie vein?

A. No, sir.

Further cross-examination:

Q. Do you want the jury to understand that you went all along from the discovery shaft of the Annie down to the Monitor?

A. No, sir; I went in there with Mr. Mills.

Q. Went across from here to a point in there where there was a flag?

A. Yes, sir.

Q. That is all?

A. Yes, sir.

134 Redirect examination:

Q. From this point here could you not see this vein clearly from this point on down to the point where you and I went across; could you not see what they are trying to uncover as a vein without any necessity of walking down there?

A. Yes, sir.

L. F. MILTONBERGER, called for defendants and sworn, testified as follows:

Q. What is your business?

A. Mining.

Q. Did you ever prospect?

A. Yes, sir.

Q. How long have you mined and prospected?

A. Most of the time since 1869; about 10 years, I suppose.

Q. Whereabouts?

A. Here and in Montana, Idaho, and Wyoming; some in the northern part of Dakota.

Q. Have you ever been on Ute hill?

A. Yes, sir.

Q. When were you last there?

A. To-day.

Q. How long have you lived in this county?

A. Little over 6 years.

Q. Where have you made your headquarters?

A. Here in Lake City.

Q. When you were in the mountains prospecting, where was your camp?

A. Different places up Henson creek and the Gunnison.

Q. Were you frequently on this Ute hill?

A. Yes, sir; I have been there a good deal the last 6 years.

Q. Did you ever work on that hill?

A. Yes, sir.

Q. What work did you do?

135 A. I prospected around there and worked some there in 1876—worked some on the Ute and Ulè and some on the Monitor.

Q. Where did you work on the Monitor?

A. In that open cut below a wagon road—below the Ute wagon road and the Henson creek wagon road.

Q. Can you indicate it on the map?

A. I don't know as I can point it out there. It is down here, I think, somewhere.

Q. The witnesses have testified that this point, "*c*," is the discovery shaft of the Annie. The upper road runs between "*c*" and "*b*." It was an open cut?

A. Yes, sir.

Q. That would be this point, "*d*." Did you do the first work that was done at that open cut?

A. Yes, sir.

Q. What was that work for?

A. For the assessment work on the Monitor.

Q. Who worked with you at that time?

A. Mr. Meredith.

Q. You were working there for the assessment of 1880 on the Monitor?

A. Yes, sir.

Q. Have you ever examined the Monitor lode with a view of ascertaining its course?

A. Yes, sir.

Q. State to the jury what is the result of that examination.

A. The vein runs down as marked here. That is the discovery shaft. It runs down in this course to "O."

Q. What is there exposed at the Monitor discovery shaft?

A. A good, strong vein there.

Q. What is there above the shaft, as far as quartz croppings?

136 A. There are croppings all the way through the length of the claim. *Q.* Well in one or two places, or more, possibly, the quartz crops out, and in other places it is covered; and where it is uncovered it shows the vein and shows quartz.

Q. State whether or not there is a road running along just above the shaft-house of the Monitor discovery.

A. Yes, sir; there is.

Q. Where does it go to?

A. I think it runs to the California.

Q. From the road going up to the Ute?

A. Yes, sir.

Q. On the side of that road opposite from the Monitor discovery do you find any quartz croppings?

A. Yes, sir.

Q. How do they indicate the vein or veins, if there be such, to run or exist?

A. The croppings indicate a part of the vein running up this way and another part off that way.

Q. In the north end of the Monitor surface ground, up next the Ute, what do you find with reference to quartz croppings extending from the center of this north end line down towards the discovery shaft?

A. Find croppings just above the wagon road and again here and again here and down there.

Q. What is the character of the lode as exposed in the shaft of the Monitor discovery with respect to its width and its dip?

A. It has a very strong dip—about that much.

Q. Which way?

A. In the mountain or north.

137 Q. Into the mountain?

A. Into the mountain, and dipping, I suppose, towards the Ute mine.

Q. From your experience as a miner, having the dip as exposed in the Monitor shaft and running down such a hill as you know this to be, how would you say it would carry that vein?

A. It would carry it to the north—the northwest.

Q. Indicate the way on the map.

A. Just as the Monitor is marked out here, it would carry it down this way.

Q. State how the quartz is exposed from the Monitor discovery down.

A. By the strippings and holes dug in, and wherever it is uncovered it exposes the vein and quartz.

Q. State whether or not, from the Monitor discovery shaft down to this point, the end of the black line, the stripping is continuous.

A. Yes; that is stripped from there almost or quite to the shaft.

Q. What is there between the end of the strippings up here and the shaft?

A. Nothing, only a little of the dump left.

Q. About how many feet of the dump?

A. I don't know; I didn't notice that particularly; perhaps 10 feet.

Q. What is the width of the vein as discovered in the Monitor shaft?

A. Probably it would measure 7 feet.

Q. Have you ever gone down on this line that is indicated here by the black mark designated as "*b*," "*c*," "*d*"?

A. Yes, sir.

138 Q. What do you say as to this vein located on and discovered in the Monitor shaft running down in that direction?

A. It don't run that way.

Q. What is there exposed down in this direction by the various workings that have been done?

A. I don't consider it anything but merely a seam in the rock. You might call it a spur.

Q. What mine does that spur run into?

A. The Ulè.

Q. What is the character of the quartz, as far as disclosed, from the Monitor discovery shaft, clear down to the end of this stripping on the Monitor vein?

A. From 8 inches to a foot, and in some places 2 feet, and in that place about 3 feet.

Q. In the east end of this cut, "*o*"?

A. Yes, sir.

Q. Is there any opening or trial pit on this Monitor vein sunk between this east end of the cut, "*o*," and the end of this stripping that has been done on the Monitor?

A. Yes, sir; there is one, I believe.

Q. Then what is the distance on this Monitor vein that is not actually exposed to the eye—about what extent?

A. I did not measure that.

Q. That map is 40 feet to the inch?

A. The only place that is not stripped is from here on down.

Q. What do you say as to the Monitor vein coursing down with the Annie where they join here?

A. It comes on down through there, and is with it wherever it is opened.

Q. Are you firmly satisfied of that?

A. Yes, sir.

139 Q. Have you examined this little cut that has been made here with a view of showing that the Monitor crosses the Annie instead of going down?

A. Yes, sir.

Q. Does that change your opinion?

A. No, sir; I don't see any vein there.

Q. Describe what that little cut discloses.

A. It don't disclose anything, only a kind of a seam there. The vein is to the right as you go up the hill.

Q. Have you ever examined this trench that is taken off down in this direction to below "*d*"?

A. Yes, sir.

Q. State what you saw there.

A. There is a little point in here just close to the Monitor vein where it runs into it. You can find an inch or so of quartz, possibly.

Q. Take it on down in its course.

A. Down in here it disappears entirely; you can't find anything.

Q. State as to its appearing here again near the Ule.

A. Well, I could not find it.

Q. The quartz that is exposed here, state whether that quartz makes the upper wall—is in close to the upper bank or is out pretty well in the trench away from it—whether, in your opinion, the whole of the vein is exposed or not.

A. I don't think it is. The quartz is exposed and some vein matter, about 18 inches or 2 feet.

Q. State whether or not the quartz that is exposed is next to the upper bank of the trench that has been dug there.

A. Well, there is vein matter; it seems to be rather in the center of the part of the vein that is uncovered.

Q. Is there not quartz clear over to the upper bank?

140 A. The quartz varies from 8 inches to a foot, with decomposed matter on each side of it, and it all dips into the mountain. I would hardly think the entire width of the vein is exposed.

Q. Have you ever examined this that is called the Enterprise vein?

A. Yes, sir.

Q. When?

A. Last term of court.

Q. Have you looked down into that since?

A. I looked down into it this morning.

Q. How deep is that shaft?

A. 9 feet or 9 & $\frac{1}{2}$.

Q. What quartz is exposed in the bottom of that Enterprise shaft?

A. Well, there is none in the bottom.

Q. Where is there any quartz at all exposed by that shaft?

A. At the top of the shaft where they commenced sinking there is about 4 inches, and it gradually narrows out and in the bottom there is none.

Q. Did you follow this trench on out in the direction indicated by this black mark?

A. Yes, sir.

Q. State what you found.

A. Found quartz in places from 1 to 4 inches and stained porphyry. There is one place where it is stained wider than others, where there is a seam coming in from this direction. In here it disappears entirely.

Q. You may state to the jury what is the character of the country at this so-called point of junction between the Enterprise and Monitor veins and what is the character off on this side.

A. It slopes off very steep.

141 Q. What kind of rock is it?
A. Porphyry.
Q. Is there any capping of any sort?
A. No, sir.
Q. Could there not be any vein there? Is there anything to hide it if there was?
A. There is nothing to hide it. There is no vein running through this part here.
Q. That is on the larger black mark?
A. Yes, sir.
Q. How long have you been familiar with Ute hill, did you say?
A. 6 years.
Q. Do you know anything about any older location or any locations on that hill other than those mentioned on the map?
A. Well, there are other locations made there in 1876.
Q. Did you or not know of a location known by the name of the Metropolitan?
A. Yes, sir.
Q. Point out to the jury the relative location of the Metropolitan with reference to that Annie vein and where the location stake of the Metropolitan was.

Objected to by plaintiff as immaterial. Objection sustained and defendants except.

Q. Were you ever at the upper end of the Monitor claim?
A. Yes, sir.
Q. Been at "*j*"?
A. Yes; I have been there.
Q. That is the one where the windlass is, I believe?
A. And rope.
Q. In the eastern end of the bottom of that shaft, state what you see there with reference to vein matter and its course.
142 A. There is vein matter in that shaft and the course seems to be that way.
Q. In that direction?
A. Yes, sir.
Q. Have you been at that black mark between "*i*" and "*j*"?
A. Yes; I have been there.
Q. That is the one with the yellow dump?
A. Yes, sir.
Q. What appears to be the direction of the vein as exposed in that opening?
A. It seems to be a little to the right as you go up the hill, from the way it was lined out on the mountain.
Q. Does it seem to take a course such as would indicate that it would appear in the point marked "*i*"?
A. Yes, sir.
Q. Would it be to the left or right or at that point, in your opinion?
A. I think the vein as exposed in these 2 places is the same.

Q. The point between "*i*" and "*h*"?

A. That is the same.

Q. Do you know of any workings up in that inner angle of the Monitor up near that angle made by the red lines, the working there being done upon a vein just about at that angle?

A. Well, I noticed some work and I think it is about that place.

Q. What would you say as to that work being done upon the same vein that comes down between "*i*" and "*h*"?

A. Well, that work down in here couldn't be on the same vein as this work here.

Q. I am taking the next black mark further down next below "*i*." What do you say as to the work done at that point
143 being on the same vein as that at the inner angle of the Monitor?

A. Well, I couldn't say as to that.

Q. Have you been at each one of these openings on the so-called Annie vein?

A. Yes, sir.

Q. What is your conclusion as to the existence of a continuous vein and it being the same vein exposed in each one of them?

A. It is not the same vein exposed in each one of them.

Q. Point out the reasons for your conclusion.

A. From here on up—from the black point between "*i*" and "*j*" on up to here as far as we went is not on the same vein.

Q. You don't think that is on the same vein as those other workings?

A. No, sir.

Q. With your pointer, begin at the Monitor discovery shaft and trace the Monitor vein as it courses down the mountain through the Monitor claim as it exists, in your judgment, and as exposed.

A. It runs in this course on down here, through "*o*," "*e*," "*d*," clear to the end of the claim.

Cross-examination:

Q. You think that the vein that is exposed in that working, which is the working between "*i*" and "*j*" on the Annie lode, and in that working at "*i*" in the working between "*i*" and "*h*" and in "*h*," is one and the same vein?

A. If I remember the places right, there was work done all through here.

144 Q. Will you answer my question: Is it your opinion that the vein exposed in the workings as mentioned is the same vein?

A. If I remember it here as I did up there, it is.

Q. Do you think that vein runs down to "*g*" and "*f*"?

A. Yes, sir.

Q. Do you think that vein is shown on the west side of this black working "O"?

A. Yes, sir.

Q. And you think the same vein is shown in "*d*," "*c*," "*b*," and "*a*"?

A. I think the Monitor and Annie connect down here somewhere.

Q. You think the workings down there are on the same vein that is exposed in these workings?

A. They are on the same vein up to in here somewhere.

Q. Where does that vein go to that you find in that working between "*i*" and "*j*"?

A. It runs towards the Ute mine.

Q. Why does it not run up here to this next working?

A. Well, in some of these holes here this vein is to the right of where the Annie vein was flagged out as you go up the mountain.

Q. Do you say now, as a miner, that the vein that is exposed between "*i*" and "*j*" is not again exposed in "*j*"?

A. No, sir.

Q. You say, as a miner, that it is not?

A. No, sir.

Q. Did you examine "H"?

A. Well, it is just as I say—I have been to all of them.

Q. You know there is a working above "*j*" and within 25 feet of it. Did you examine that?

A. I was at all those places, but I can't place them there.

145 I have not been up there since last spring.

Q. What is exposed in "*e*"?

A. I don't know that.

Q. You are not prepared to say that this Ute vein does not come down here as exposed in these workings and as put upon that map?

A. I will say this: That I don't think that these workings here are on the Ute vein.

Q. Do you say that that is not on the Ute vein?

A. No, sir.

Q. Do you say that that is not on the Ute vein?

A. No, sir.

Q. Here is a vein that is running almost straight. Why do you say that that vein does not continue on its course?

A. For the reason that, taking the dip of the Ute vein and taking the steep slope of the mountain down here, it would throw the Ute vein more over here.

Q. Isn't there a very decided bend caused by the very depression you speak of?

A. No, sir.

Q. Is that a straight line from there to there?

A. No, but the mountain slopes nearly the other way.

Q. It is very steep right there, is it not?

A. Yes, sir.

Q. You are theorizing, although you have never found the Ute vein over here, notwithstanding the demonstration that is found in the pits?

A. Well, in these workings here it don't show any dip.

Q. It shows a vein, does it not?

A. It shows a spur. I don't call them veins.

Q. It shows a crevice filled with mineral matter?

A. Yes, sir.

Q. You say that according to your notion the Ute vein
146 proper comes down in this direction?

A. Yes, sir.

Q. And yet this Monitor is located as an extension of the Ute vein?

A. The Ute vein splits here at the shaft, and part goes this way and part this.

Q. But you say the Ute vein, because of the dip, must come further down in this direction?

A. The Monitor and the Ute are separate veins.

Q. Didn't you claim at the last trial that that was an extension of the Ute vein?

A. I didn't swear to that, as I know of.

Q. You say that what is disclosed in the Monitor has no relation at all to the Ute?

A. Oh, there is a relation.

Q. What relation is there, if the Monitor is not a part of the Ute?

A. The Monitor might run into the Ute mine somewhere up there on the mountain.

Q. Is the Monitor vein located properly from that point to that point—from the intersection of the Enterprise to the Monitor?

A. Yes, sir; I think so.

Q. You say that it ought to bend around in this direction?

A. Yes, sir.

Q. And do you think it ought to bend up in that direction?

A. Well, there is part of it bends up in that direction.

Q. Did you ever hear of a claim called the "Straddle Bug," located down here across the Monitor and Ule? Don't you think that ought to have been the name of the claim? I will ask you if it
147 does not keep at about the same angle of ascent from 35 feet below the point of intersection of what we assert is the Monitor vein to the Monitor shaft.

A. Very nearly.

Q. Then will you state how it is, if from there to 35 feet below you have about the same angle of ascent, that this Monitor claim should suddenly take a turn over in this direction?

A. All veins vary in their course and the quick slope of the mountain from the shaft down here would naturally throw the vein.

Q. Here is a point from that point to that point that you deem is about the same angle of ascent and descent and yet you say the vein should bend about the middle off in that direction?

A. I find that the vein runs in this course and the slope of the mountain and this little sag down in here would throw it down in here.

Q. Your theory is that on account of inequalities of the surface, which would expose the vein at a lower part of it than it would be exposed if it had not been worn out, it would seem to take a turn where in fact it does not turn?

A. Yes, sir.

Q. You would not find that turn until the angle of ascent or descent was somewhat changed?

A. There is a change of course in the vein on the side of the mountain.

Q. From that point down in that direction for a distance of about 150 feet is not the angle of descent about the same?

A. Well, nearly so.

Q. Would you expect where you have a regular declination to find a curve in a vein on its top at the middle of that regular
148 declination?

A. Well, I don't know as I really understand that. We might say that the vein makes a little bend right there.

Q. Now we will come to what is termed the Enterprise vein. First, let me ask you if the crevice containing vein matter don't vary in width at different points along the surface?

A. Yes, sir; it does.

Q. Is it not common in your experience to find a crevice of considerable width coursing along and pinching up until there is perhaps nothing more than a seam and then opening out again?

A. Yes, sir; veins do sometimes pinch up that way.

Q. Is it not your experience in underground workings that you will run a level and come to where the crevice will close almost absolutely out and you will go along that seam until the vein will open out again?

A. Yes, sir.

Q. Is it not your experience as a miner that the finding of valuable ore that can be worked with a profit is rather the exception than the rule—that is, that tight places in veins are more prevalent?

A. That is owing to the grade of ore and the formation and one thing and another.

Q. Are you not far more likely to find a crevice that will run but a couple of hundred feet and then tighten up?

A. The larger the vein the less liable they are to entirely pinch up.

149 Q. But yet they do pinch up and very large veins will pinch up?

A. Yes, sir.

Q. So that you don't determine what is the continuation of a vein, do you, simply because you find that the vein at one part is wide and the crevice at another part is quite narrow?

A. Well, take it on that mountain and in that distance—veins hardly ever pinch up in 200 or 300 feet.

Q. It depends upon where you strike the vein, does it not?

A. Yes, sir.

Q. For instance, you say you have a crevice about 5 feet in width down in that discovery shaft, and yet down here you have only about 8 inches?

A. I don't think you do there.

Q. Is it not a fact, according to what you stated, that that shaft disclosed a vein 5 feet in width?

A. Yes, sir.

Q. And that down here it is not to exceed a foot in width, and for you to know whether it was wider than that you would have to dig down?

A. Yes, sir.

Q. What do you mean by cap rock?

A. Rock that is lying over a vein.

Q. Is it the country rock?

A. Yes, sir; oftentimes.

Q. Below this point of intersection do you find country rock?

A. Yes, sir.

Q. Why do you say this may not be cap rock?

A. It don't look to me like cap rock.

Q. Does the common country rock differ from cap rock?

A. Not that I know of.

Q. Why do you say that that may not be cap rock for a
150 short distance down there?

A. It don't lay right for cap rock.

Q. Does cap rock lay in any particular way?

A. In my experience in cap rock the seams run horizontal in cap rock.

Q. What sort of seams?

A. Seams in the rock.

Q. Are there any regular seams in porphyry rock—different regular seams?

A. There are seams.

Q. You say the seams don't lay right?

A. I don't think it is capped over there because we can trace the vein from here and here right on down.

Q. Is there any reason in the form, position, structure, seams, or clearage in the rock that you find right down there that causes you to say it is not cap rock?

A. Just in my judgment.

Q. Is there any reason why you should say that this is not cap rock?

A. The only reason that I don't think the vein is capped over there is because this part, as traced up here, can only be traced, I think, to about there; then the seams run different. This seam comes up here. There is another starting in this direction. That leaves a strip 30 feet wide that these seams don't run through at all.

Q. If it was capped over you would not see it, would you?

A. No, sir.

Q. Then why do you say it is not capped over?

A. Because this part down in here—I don't call it a vein; I consider this a spur, and it disappears up here.

151 Q. What do you call a spur?

A. It is a small streak.

Q. What do you call a vein?

A. A crevice in the rock filled with mineral matter.

Q. Does it require a crevice in the rock to be of any particular width to be a vein?

A. I don't know as to that.

Q. Is there not from here down there a crevice in the rock?

A. There is.

Q. Is it not filled with mineral matter?

A. No, sir.

Q. What mineral matter do you find in what you call the Monitor vein?

A. Quartz.

Q. Would you call that mineral matter?

A. Yes, sir; that is vein matter.

Q. Would you call that vein matter?

A. I never found much of that in a vein.

Q. Do you call that mineral matter?

A. Yes, sir.

Q. Suppose you found a crevice down here filled with that, would you call that a vein or lode?

A. We call them spurs here.

Q. It would come under the definition of the vein, would it not?

A. Perhaps so.

Q. You say there is what you call a spur traceable from the Ulè lode clear up in that direction to within 20 or 30 feet from there?

A. Yes, sir.

Q. Is not that the general course of the Monitor vein through it?

A. It does not take the general course, taking the slope of the mountain.

Q. Is it the same general course?

A. Yes, sir.

152 Q. Do you find in your experience as a miner what are called cross-veins—that is, a vein cut right in two by another?

A. I never found any of them in my own experience.

Q. Have you seen them in your prospecting?

A. Yes, sir.

Q. Is it not very common in the mining country where veins are plenty, whether they are rich veins or poor veins, to find that the large veins are crossed by other veins?

A. Yes, sir.

Q. Is it not your experience that where you find one vein cut by another vein that at the point of puncture the presence of the vein that has been cut by the other vein is more or less obliterated and that you have to look for it further down until, as miners say, it commences to form again?

A. In my experience in this country they are broken up some.

Q. Their identity is somewhat lost?

A. Yes, sir.

Q. We will come down here to the Annie. You admit, do you not, that there is a crevice that apparently runs from that point

there between "O" and "E" across the Annie vein and out in that direction?

A. There is a seam there.

Q. Isn't it a crevice that is plainly seen?

A. I would call it a seam.

Q. Isn't it a crevice?

A. Well, call it a crevice.

Q. Don't you find off the line of the Annie vein just about midway between that crevice plainly discernible 5 or 6 inches of decomposed quartz?

A. No, sir.

153 Q. You find in this end of that working the vein that comes down in this direction?

A. Yes, sir.

Q. You find in that end the vein you think is disclosed there?

A. Yes, sir.

Q. You find in about the same general direction cutting across the vein a crevice. You say it is a seam?

A. Yes, sir.

Q. Why may not that be a continuation of the identical crevice that you find up there running in that direction?

A. It don't look like it—not enough in there to call it a vein.

Q. You have already admitted that a vein may pinch up?

A. Yes, sir.

Q. And now you say because this pinches up it is not the same vein?

A. Yes, sir.

Q. Did you notice a stripping indicated by this black mark down to this long cross-cut "E," in which they stripped right down to the rock from there down right into that cross-cut?

A. I believe I did.

Q. Did you notice any evidence of a vein?

A. No, sir; the vein is to the right from there up. The dirt they threw out of this cut lay on top of the vein.

Q. Don't you find right down in that crevice the vein pinch up and the vein material right in it?

A. Yes, sir. I claim that this same vein that shows there is the same that shows there.

Q. What becomes of the Annie?

154 A. That keeps to the left of that.

Q. Where do you see that?

A. At least I think it is. It is not uncovered.

Q. Up or down the hill?

A. The Annie, as we go up the mountain, is to the left of this vein that shows here and here.

Q. Is it not exposed there?

A. Yes, sir.

Q. And you think the vein that is exposed there is not the vein that is exposed there?

A. I don't think it is.

Q. There is a vein exposed there?

A. Yes, sir. Here is the difference: The Annie vein shows in this end. There is a difference of 22 feet.

Q. Don't the Annie vein show there?

A. I think it does.

Q. Don't the Annie vein show there?

A. Yes, sir.

Q. Would not that be its natural course?

A. There is nothing in there to show that the veins cross that I can see.

Q. Upon your theory you think it is not there?

A. I don't think it is there.

Q. You say that that which is exposed along here shows the top of the vein from 8 inches to a foot in thickness?

A. Yes, sir.

Q. Doesn't it show all the way along a sort of a ridge something like that—a rounded top running right through the cut made in the earth?

A. The quartz in one place is very smooth. I believe that is the place.

Q. Isn't it a sort of an oval ridge?

155 A. Not all the way; only in one place—right in there.

Q. You say that the only ridge that is descernible is only between those 2 points?

A. The quartz between those 2 points is a great deal smoother, although it shows quartz all the way through there.

Q. Doesn't that ridge of quartz continue unbroken and undisturbed right straight to the Enterprise shaft?

A. Yes, sir.

Q. That ridge of quartz lines right through the Enterprise shaft?

A. Yes; you can line it there.

Q. Why do you say that that is not tne Enterprise vein?

A. Because the Monitor vein is agood deal stronger vein. After you get up here above the wagon road that Enterprise vein goes off into little streaks.

Q. Don't it show from there down to there?

A. There is a little quartz there.

Q. Isn't it the same ridge you find down there?

A. I don't know.

Q. And is not this apparently a distinct body of quartz running from there down to there, and is it not sort of lost there?

A. No; it is not lost.

Q. Is the body of quartz that you find down here as large as that there?

A. No, sir; not that is exposed. Through here there is from 8 inches to a foot of quartz. Here there is about from 1 to 4 inches.

Q. And here it is larger?

A. There is from a foot to 18 inches of quartz; maybe 2 feet.

156 Q. Is there not a greater discrepancy, then, in size between that and that than there is between that and that?

A. Well, I don't know but there is. We can trace this vein clear through up in here and clear down through here, and this you can't.

Q. So that now the sum and substance of your opinion is we have a continuous vein from *from* that point up to that point, and you are not very positive beyond it?

A. If I remember the holes right, you might call it a vein. You can trace it up to the Ute vein.

Q. You have a continuous vein from that point down to that point?

A. Yes, sir.

Q. And you have a continuous vein from the Enterprise shaft or beyond clear down to that point?

A. I think this Enterprise spur follows right on through here.

Q. Don't you think that spur is properly located, showing just about the course of it?

A. Yes; I think it is.

Redirect examination:

Q. State to the jury which of those veins, the Monitor or Enterprise, shows the strongest above the point where they come together.

A. The Monitor.

Q. State to the jury how much larger it is than the so-called Enterprise vein.

A. Well, the Enterprise vein on top shows, where the shaft is sunk, about 4 inches of quartz and a little decomposed matter each side of it, possibly altogether about 15 inches wide, while
157 the Monitor mine has 18 inches to 2 feet of quartz in it, and where the shaft was sunk what we consider the walls was about 7 feet apart, and in the bottom of the Enterprise shaft there is nothing, and as far as I know I have never been down the Monitor shaft—the shaft has a good vein all the depth.

Q. How far down could you see in the Monitor?

A. Possibly 30 feet; maybe 40.

Q. State whether in your experience as a miner a true fissure vein, in sinking on it, ever entirely pinches out in the distance of 9 or 10 feet.

A. I have never known a true fissure vein to pinch entirely out. The mineral and vein matter may pinch entirely out, but I have never known a true fissure vein to pinch entirely out.

Q. Do you need any theory with reference to tracing the Monitor vein that is located at the shaft now, that it has been entirely stripped to view?

A. No, sir; it don't require any theory.

Q. Is it a subject of theory or not?

A. I don't know that it requires any theory at all to trace it now.

Q. If you were to say that the Monitor vein disclosed in the shaft ran down in this direction, you would have to use a theory to bridge it over?

A. I don't know that I mean here.

Q. Is there any vein exposed?

A. No, sir.

Q. Then you would have to theorize, wouldn't you?

A. Yes, sir.

158 Q. I would ask you to state if — this cut "O" there are not 2 veins exposed.

A. Yes, sir.

Q. On which side, going up the mountain, is what you call the Annie?

A. In the left hand as you go up the mountain.

Q. In the east end is about 3 feet of matter?

A. Vein matter and quartz; yes, sir.

Q. What is the opening down here—what does that expose?

A. Exposes the vein.

Q. Is there any indication of any crossing between this opening "O" and this opening at "*e*"?

A. No, sir.

Q. I will ask you to call to your memory the relative size of the 2 veins, one exposed in the east end and one exposed in the west end in that open cut "O."

A. The Annie is about a foot wide—shows about a foot of vein matter—while the Monitor is between 2 and 3 feet wide.

Q. Following up the mountain from that point, that open cut "O," what is the comparative strength of the Annie as disclosed at those several trial pits as compared with the strength of the Monitor?

A. The Monitor is the largest and strongest vein of the 2.

Q. Clear through?

A. Yes, sir.

Q. I will ask you whether, with the dip that the Monitor vein has at the shaft, it could possibly go down in the mine of that black course indicated by "*b*," "*c*," "*d*," "*f*" towards the Ulè.

A. No, sir. Take the dip of the vein and the slope of the
159 mountain it could not run there.

Q. Impossible for it to run there, in your judgment, is it?

A. Yes, sir.

Further cross-examination:

Q. It is impossible on your theory, is it?

A. It is impossible in my judgment.

Q. A crack of the earth in any direction is impossible?

A. No, sir.

Q. You say that although there are four or five inches of quartz there it pinches out at the bottom of 9 feet?

A. Yes, sir.

Q. Between that point and that is there any working that shows that that don't pinch out at the depth of 9 feet?

A. No, sir; it is just uncovered at the surface.

Q. You say that the vein there is shown how wide?

A. I think between 2 and 3 feet.

Q. You say that that is the Monitor vein that is shown down there?

A. Yes, sir.

Q. How much of that vein is shown there?

A. 8 inches or a foot.
Q. Don't you know it don't show over 4 inches?
A. I was not in there to-day.
Q. Why don't you say from the size that what you find there is the Annie?
A. It is nearly on the course of the Monitor.

160 GEORGE CHILDS, called for defendants and sworn, testifies as follows:

Q. Where do you reside?
A. Lake City.
Q. How long have you lived here?
A. Since 1875.
Q. What is your business?
A. Prospecting and mining.
Q. How long have you been prospecting and mining?
A. Since 1869.
Q. Where?
A. Lead mines in Missouri and Colorado.
Q. How long have you mined and prospected in Colorado?
A. Since 1875.
Q. Have you ever been on Ute hill?
A. Yes, sir.
Q. When were you last there?
A. This morning.
Q. Have you ever examined the several veins there exposed on that hill?
A. I examined the Monitor; was the only vein I examined particularly.
Q. Did you ever examine it before?
A. Yes; in April.
Q. How many times have you been up there?
A. Twice or three times, I believe, in April and this morning.
Q. Have you been at the Monitor discovery shaft?
A. Yes, sir.
Q. You may state to the jury what was disclosed there with respect to a body of quartz.
A. It was a good-sized vein there; I would judge from 3 to 5 or 6 feet.
Q. Have you ever been in the shaft?
A. No, sir; I have not.
Q. Have you looked down?
A. Yes, sir.
Q. How far were you able to see?
A. I judge 25 or 30 feet.

161 Q. What is the dip of the vein as disclosed in that shaft from a perpendicular?
A. About that pitch, pitching into the mountain.
Q. Have you ever been on the vein just above this old road that runs over to the California?

A. I was, in the spring.

Q. What is exposed there?

A. There appears to be considerable quartz and vein matter.

Q. What direction of quartz does it appear to have?

A. I judge from the looks it is not uncovered; it runs in two directions.

Q. Point out the direction in which you judge it runs.

A. Apparently one streak of quartz runs off in that direction and another one in this direction.

Q. State if you have been here below the Monitor shaft—below the dump.

A. Yes, sir.

Q. How close to the shaft is the Monitor vein stripped?

A. I didn't pay particular attention, but I judge from 10 to 25 feet.

Q. Point to the jury, starting from the Monitor discovery shaft, where the vein located in the shaft runs down the mountain.

A. Here (indicating to cut "O").

Q. When the Monitor vein unites with the Annie is it your opinion it continues on with the Annie through the claim?

A. There is nothing positive about their uniting at all, although they apparently run in the same direction down the hill.

Q. Is there any indication of their crossing?

A. None that I can see.

162 Q. Did you examine this opening here?

A. Yes, sir.

Q. Did that indicate any crossing of the Monitor vein?

A. No, sir.

Q. Beginning with the Monitor discovery shaft, indicate where this vein runs.

A. It runs along there somewhere (indicating) as far as uncovered and there at "O" it is uncovered again—supposed to be the same vein—and then there is an open cut, "*d*"—I suppose that to be the same vein—and then two places there I didn't look into at all.

Q. Did you examine this black line indicated down here as going into the Ulè?

A. Nothing only right along in there; there was two men at work this morning (indicating just below where the Enterprise vein is marked on plaintiff's map as crossing the Monitor as there indicated).

Q. What were they doing?

A. Blasting there.

Q. How far could you see standing there?

A. Clear down to the road.

Q. How far down on the course of this black line?

A. That black line must indicate a yellow streak. I could see down below. I could see it down there, but right along here I couldn't see anything at all.

Q. Was there any indication of any lode whatever coming in at that point?

A. None that I could see.

Q. Have you examined this trench?
A. Not since spring.
Q. What does that expose?
A. There is a little quartz in places in it; in some places
163 there is nothing but stained rock. It shows the most quartz, I believe, right there where it comes into it.
Q. What is the width of the quartz in the Monitor mine at this point, about 40 or 50 feet below the shaft?
A. I would say 18 inches to 2 feet.
Q. What is the width of the quartz on the Monitor vein as exposed here?
A. I measured along there last spring. The narrowest place, I believe, was about 6 inches and the widest about 18 inches to 2 feet.
Q. Quartz?
A. Yes, sir.
Q. Is there other vein matter besides quartz?
A. In some places; in other places it is not uncovered enough to say.
Q. Have you ever examined that Enterprise shaft?
A. Yes, sir; I was down in it last spring.
Q. State to the jury what that disclosed.
A. There is a little quartz along the side of it and right in the bottom the quartz apparently plays out. I should have gone down in it to-day, but somebody had apparently filled it up. There was about a foot of rock.
Q. From this point on did you follow that trench out?
A. Yes, sir.
Q. What did that indicate on beyond?
A. There was one place right around there where there was apparently a seam going in or coming out. There was 2 or 3 feet of vein matter in one place; following it out there wasn't anything.
Q. Had it been opened with a view of exposing a vein if
164 there was a vein there to be exposed?
A. I suppose that was the object of the trench.
Q. There is a distance of about 85 feet between that point and this cut, "O," according to that map. In that 85 feet is there any opening on the Monitor vein?
A. There is an opening right along there somewhere, I should judge; there was one there this morning.
Q. That leaves about 40 feet on each side of that trial pit, only that is not exposed on that vein until you come up to the Annie?
A. Yes, sir.
Q. Tell the jury what is the relative size of the two veins exposed in the open cut "O."
A. There is from 2 to 3 feet of quartz in that end, and this end, I judge, there is 12 or 14 inches. It is not all quartz; it is stained rock. I didn't pick into it to see what it was composed of.
Q. What is the relative size of the Monitor vein as exposed by the trial pits and stripping on up to the shaft compared with the Annie vein?

A. This Annie vein I have never examined, except if this is it in this west end of "O."

Q. What is the relative strength there?

A. As I said, this is from 12 to 15 inches; that, I judge, is from 2 to 3 feet.

Q. You say you examined this cut "*e*" this morning?

A. Yes, sir.

Q. What does that show?

A. There is a seam comes off in that direction. I would call it a vein.

165 Q. Do you remember at this point here last spring that there was another cut below here that had a vein exposed in the two ends?

A. As far as I can remember, I think I do.

Q. Isn't this line that is drawn down from the Annie vein, this violet line, the west end of this long cut "*e*"—was that not at the last trial represented on this map as being simply right there at the west end?

A. As well as I can remember, I think it was.

Q. Is there any opening between that cut and the beginning of this line up here that shows any vein to be running down there?

A. There is an excavation somewhere along here, but I didn't see any vein in it.

Q. What did you state as to the width of the Enterprise vein at the top of the discovery shaft?

A. I would say a foot. I don't remember of examining it thoroughly.

Q. How much quartz is there at the top?

A. I believe up and down the side of the shaft about 5 inches was the most I found in any one place.

Q. How far is the Monitor shaft from the Enterprise shaft?

A. I judge 15 to 20 feet.

Q. What do you say is the width of the quartz in the bottom of the Enterprise shaft?

A. Last spring I didn't see any. There is now probably a foot of stone in the bottom of it.

Q. State the character of the Enterprise vein as it descended in the earth as you noticed it in the shaft.

A. There was 2 seams at the top and they gradually grew
166 together towards the bottom.

Q. Wedge shape?

A. Yes, sir.

Cross-examination:

Q. How constantly have you mined since 1875—that is, actual mining?

A. Mined or prospected?

Q. Mined.

A. It would be a hard matter for me to tell; a little over 2 years, maybe 3 years.

Q. Have you ever had much experience with veins at points of juncture where they are crossed by other veins?

A. No, sir; not under the surface.

Q. Have you ever studied or tried to inform yourself as to what you might naturally expect to find as the condition of things at the point of juncture of cross-veins?

A. No, sir.

Q. You were a witness at the last term?

A. Yes, sir.

Q. You knew that from that point down to that point was the real ground of controversy?

A. No, sir; I did not.

Q. Didn't you learn that one side claimed that the Monitor vein continued in its regular course, and that what they claimed was the Monitor was, in reality, a separate and distinct vein?

A. I don't know as I understand you.

Q. Didn't you learn on the trial while you were a witness that the owners of the Annie vein asserted and claimed that the Monitor vein below the point of intersection of the Enterprise vein
167 ran down that bluff of rocks and went into the Ulè vein and did not go down here?

A. No, sir.

Q. Did you know the point of difference between the two parties last spring?

A. Not if that was it.

Q. Did you not know that that was not stripped until several days after the commencement of the trial?

A. Last spring I came along here and walked off in a cut down there.

Q. And didn't Mr. Mills or some one tell you that this was what we claimed as the Monitor vein, and that you ought to examine it?

A. No, sir.

Q. Were you up there with Mr. Mills?

A. No, sir; I went up there with Mr. Bushnell before there was any stripping done.

Q. That was for the purpose of this trial?

A. I did not know it at the time Mr. Bushnell took me up here and asked me where that vein ran, and I told him I thought it ran up here, and if he would put men at work there he would find it, and he did so.

Q. You did not go down in here?

A. No, sir.

Q. You were up there this morning?

A. Yes, sir.

Q. With whom?

A. Snowden and Miltonberger.

Q. Could you not see that a great deal of work had been done down here?

A. The principle part of the work seemed to be done along here.

Q. And you did not go down here?

A. No, sir.

Q. Could see that a considerable amount of work had been
168 done by the side of the Enterprise shaft?

A. No, sir; I don't think there has been over one or two shots since I was there last spring, and the dirt has all been left in it, so that there was not much.

Q. Could you not have cleaned it out?

A. I could have cleaned it out, but I did not go up there for that purpose.

Q. So that you now testify from examining about from there to that point and looking down to see what you could see there, and from there above the Enterprise shaft?

A. Yes, sir.

Q. And from there down to there, that is as far as you went?

A. Yes, sir.

Q. That is all the examination you made for the purpose of satisfying yourself?

A. Yes. sir.

Q. Suppose that had not been opened on the Monitor shaft from that point there up to the discovery shaft, and this trench had been dug as it is dug, and you had looked right along the ridge of vein matter that is disclosed there; would you not have felt satisfied that that was all the same vein?

A. At first, if there had been no disclosures up here, I probably would have thought so.

Q. What you find up there is considerably wider than what you find along here?

A. Yes, sir.

Q. You find the vein matter along here anywhere showing about 8 inches?

A. Yes, sir.

169 Q. And, consequently, is not the vein about the same average size?

A. No, sir; I said that was about a foot; I didn't mean all quartz. Down here where I measured it it was all quartz.

Q. Veins widen and close up, do they not?

A. Yes, sir.

Q. You don't know but what if you would go down there 4 or 5 feet you would only find 4 or 5 inches of quartz, do you?

A. No, sir.

Q. As a miner, wouldn't you be more apt to think that ledge of quartz that you saw disclosed where it was almost straight was more likely to be the same identical vein than where a part would branch off in another direction; don't you look for considerable straightness in the line of a lode?

A. Not always; as a general rule I do.

Q. Is it not true that a lead has the same general course, although there may be certain divergencies on the surface?

A. Yes, sir.

Q. If you would find upon the surface of the earth for 200 feet shafts sunk at intervals disclosing a vein of quartz, apparently

running in the same general direction, would you not believe as a miner it was on the same vein?

A. Yes, sir.

Q. And where you came to rugged, broken, rocky ground, the fact that that vein would disappear for a short time, but if running in the same general direction you would find a vein, would that lead you, as a miner, to think it was a different vein?

A. No, sir.

170 Q. Did you notice the material on the dump of the Monitor discovery?

A. I did not to-day.

Q. Isn't your recollection this, that the great bulk of what is found on the dump is apparently porphyry or country rock with little veins of quartz scattered through it?

A. I would not say as to that. I did not examine it and therefore I would not like to say.

Q. From the Monitor discovery house within the cabin did you look down to see the dip of the vein?

A. Yes, sir.

Q. If you were standing in the Monitor cabin and you looked down at the dip as disclosed 15 or 20 feet would not the dip apparently take you straight down as the Monitor runs right through the shaft?

A. I would judge not.

Q. Is not that about as you would have it from there to there?

A. I think there is more of a curve in the vein than there is there.

Q. Isn't there that much of an angle?

A. There may be. It looks a little different to stand there.

Q. Looking down into the Monitor shaft, you get the face of the foot wall on the east side?

A. Yes, sir.

Q. Does not the course of that foot wall run just as it is drawn from there to there?

A. Run it straight.

Q. Then if that is the case is it not about right from there to there?

A. That line would probably take you straight on through.

171 Q. And if that is a part of the Monitor vein there and there that would give you about the strike, of course, as disclosed on the Monitor foot wall.

A. I did not examine it.

Q. You say that at that point there is 2 or 3 feet of vein matter exposed?

A. Yes, sir.

Q. Quartz?

A. Most of it is quartz.

Q. Down there how much of a vein do you find?

A. It is pretty well closed up.

Q. Is there over 4 or 5 inches?

A. That is about all you can see.

Q. What becomes of it?

A. It passes through there. The excavation is not sufficient there to show how it is.

Q. Is not the excavation made right on the solid rock?

A. I think it is.

Q. Does it not, so far as the excavation is concerned, show that what there is there has tightened up to four or five inches?

A. I think so.

Q. The mere fact you would find the large crevice up here would not at all lead you to suppose that another vein had come in?

A. No; I think not.

PETER ROBERTSON, called for defendants and sworn, testifies as follows:

Q. Where do you live?

A. Hinsdale county.

Q. How long have you lived in Hinsdale county?

A. More or less for the last 11 years.

Q. What is your occupation?

A. Mining.

172 Q. How long have you been engaged at it?

A. About 13 years.

Q. In what parts of the country have you mined?

A. Clear Creek county, Hinsdale, Rio Grande, San Juan.

Q. Done any prospecting?

A. Sometimes a month during the summer; perhaps for this last ten years a month in the summer season.

Q. Are you acquainted with the Ute mountain?

A. A little.

Q. Ever worked there?

A. Yes, sir.

Q. When did you first become acquainted with it?

A. In 1871 was the first time I was on the mountain.

Q. Were there any claims or lodes located there then?

A. Yes, sir.

Q. What?

A. The Ute and Ulè.

Q. Were you acquainted with the Monitor?

A. The first I was acquainted with the Monitor was in 1877.

Q. How did you become acquainted with it?

A. I went to work there.

Q. Where did you work?

A. I worked in the discovery shaft.

Q. Did you ever attempt to trace the Monitor vein?

A. Well, a little. I help to strip a part of the Monitor vein.

Q. Sink any pits there at any point last year?

A. Just to bed rock through the gravel; that is all.

Q. Where were the pits; do you understand that map?

A. I worked here and here, I think.

Q. The point "O," when did you work there?

173 A. In August, 1881.

Q. What did you do?

A. I sunk a pit here—right there. It was 2 pits of 10 feet long, each of them.

Q. What did you find there?

A. I found a vein in both pits—vein matter.

Q. Did you ever trace or attempt to trace the vein from the discovery shaft down through to fix where, according to your best judgment, it ran down through the lower portion of the surface ground of the Monitor?

A. No, sir; I never got any further than from here to here.

Q. That is by workings?

A. By workings.

Q. By observation of other workings that were already done, the lay of the ground and observation, did you ever attempt to form a judgment as to where it ran from here down through?

A. I never see it at any point definitely after it left here. Down here there are other holes with crevices in them, but beyond here I never could say I saw it definitely.

Q. Did you ever make up your mind that this here and this were identical veins?

A. The way that runs and the way this runs, appearances would lead a man to think they were.

Q. What is your judgment about it?

A. I would judge that they were.

Q. Did you ever attempt to trace the vein or form a judg-
174 ment as to where the Monitor runs above the Monitor discovery shaft?

A. I was up there last summer. I saw quartz, I think, coming off in this direction running towards the Monitor shaft, probably a foot of quartz, and then down here you see indications running off in that direction. Further than that I could not say. It is all covered with slide.

Q. The vein coming down from the upper end of the Monitor surface ground, about how far east of the pit "*j*" does it run?

A. There is a shaft on the extreme end of the Ute surface ground that appears to me to be 12 or 14 feet.

Q. That is "K"?

A. Above 100 feet or 75 feet east or northeast of that there is a strip of quartz runs in that direction until you come down here and then it is covered with slide-rock.

Q. Above the Monitor discovery shaft what is the indication as to the character of that?

A. There is quartz going in most every direction, some up this way and some up this way.

Q. When were you last on the Monitor mine?

A. I think it was Wednesday, this week.

Q. Will you describe the appearance of the Monitor vein from the discovery shaft down the mountain, and first indicate where you think it runs down through the Monitor surface ground?

A. Well, from the discovery shaft about 20 feet below you can

follow continuously right down this way, I should say there-
175 abouts, and then there is pits along here and perhaps, maybe, the pits commence here, but down this way you can follow a continuous streak of quartz, and right down here there is a vein in the east end of the pit "O," and a vein in the west end, and below that I never saw any quartz or vein matter I could say was the lead. There are other pits, but I did not see any vein in them.

Q. Nothing in any of those pits or workings?

A. I had no pick and I could not see anything but wall rock; down here in those workings there is vein matter, but between "*b*" and the "O" I could not say that I seen any vein matter.

Q. Describe what you found in "*d*," any quartz or vein matter.

A. I never examined those holes below.

Q. Following down along here, do you know what "*a*" represents?

A. No, sir.

Q. It has been testified here that it represented the discovery shaft of the Rachel?

A. I have seen the Rachel. I was living right there when they discovered it.

Q. Had a cabin there?

A. Yes, sir.

Q. How long did you live there?

A. More or less for about 4 or 5 years.

Q. How about any mineral taken out of the Rachel?

A. I have seen quartz with mineral in it—galena and copper and iron.

Q. Was it clear galena or only a small amount?

176 A. A small amount.

Q. What width of the vein showing pay streak?

A. I could not definitely say. There might be a pot and there might be 2.

Q. In "*b*" what pay streak?

A. I couldn't say. I never measured it; only looked at it as I was passing by.

Q. Well you give us the width of quartz apparently in the vein from the discovery shaft down through as far as it is stripped?

A. I worked in the bottom of that shaft. There was about 16 inches quartz, and up on the surface of the shaft I should judge there was 3 feet; perhaps more. There was 3 or 4 feet of crevice down here. It appeared to carry its size down to about — and then narrows up to about a foot in thickness until you come down here and then there is a split, the larger portion of quartz coming down this way, and in some places it is about a foot and some places more. In this hole "O" there is about 2 feet, I should judge.

Q. At the point "O"?

A. At one end—on the west end—about one foot of quartz and crevice matter, and on the east about 2 feet.

Q. On the west end, how much of that foot is quartz and how much crevice?

A. There is about a foot of stuff; porphyry or whatever it might

be; sometimes quartz. I never worked there, and they are only on the surface yet; not into it a foot I don't think. It shows about a foot of crevice matter.

177 Q. What is the width from the discovery shaft to "O" on the Monitor?

A. Here it is about 3 or 4 feet and then narrows up and would average about a foot from there.

Q. What is the appearance as to whether the vein is uncovered?

A. In some places it hugs right along the bank so that in some places there might be quartz under the bank; I couldn't say.

Q. Did you observe any workings between "O" and "*e*"?

A. Yes; there was considerable digging from here down, but I didn't see nothing to justify me that I seen any lead. Perhaps more development might show it.

Q. Nothing to justify you in saying there was any lead there at all?

A. No, sir.

Q. Did you get down in this ditch and walk along in it?

A. There are so many ditches around there and diggings I don't know which one that is. I examined the greater portion of them.

Q. Did you find any quartz in any of those workings?

A. I couldn't say I did in place, because it was loose ground there. If I had had a pick I could have satisfied myself more.

Q. You mentioned that at this point a portion of vein matter went down here, but the larger portion went down towards "O"?

A. Yes, sir.

Q. Will you describe the vein matter in this branch that runs off?

178 A. There is sometimes 6 inches of quartz. In some places there is over a foot of quartz. I followed it down to a point here some place and I see about a foot of quartz here, and then there was a barren place here and I didn't follow it down to there.

Q. Will you state, as between this branch and this larger vein running down towards "O," the comparative size, which is the larger and how much the larger?

A. I couldn't say exactly. It appears to me to be the strongest portion of the vein.

Q. Did you ever examine this dark line upon which "*c*" and "*d*" are situated, below the Monitor discovery shaft?

A. Is that where this comes in?

Q. Yes; where this Enterprise vein or spur come together; from that point, then, down through "*c*" and "*d*."

A. Right under here, I guess it might be 30 feet, and I didn't see any indications of this vein over there or this, either, but they appear to come together until they come here. They come together there and run together until they come to there.

Q. In the same crevice?

A. That is what it appeared to me.

Q. And you could see no indication of a vein running over here?

A. No, sir.

Q. You stripped to bed rock?

A. Yes, sir.

Q. Did you ever look around down below here on this vein?

A. I have been down there; I don't know exactly how far;
179 I didn't go clear through on that line. Right in hereabout is a sort of yellowish streak, but I didn't find any quartz. That was the only indication I see at all, and that was about 50 feet from here down here.

Q. Before there was stained rock, even?

A. Yes, sir.

Q. Did you ever examine up here at "r," above the Monitor discovery shaft?

A. I never went above this point to pay any particular attention.

Q. Did you ever trace through these veins running above the Monitor discovery shaft to see where they terminate according to your best judgment?

A. Not accurately, because the ground is covered with slide. I know I never saw them from this point up. I have seen streaks of quartz, but whether it was the same as this or this I could not say.

Q. From your examination last year did you form any judgment as to whether those veins ran up into the Ute?

A. Yes, sir; I believe they are branches of the Ute, but where they intersect I don't know, but I think they might intersect up here somewhere. It is hard to trace them on the surface.

Q. Did you find croppings that would indicate they ran up into the Ute?

A. Yes; I found croppings, I guess, about that point.

Q. Did you find croppings up here on the Ute surface ground?

A. They were headed that way. I could not exactly point out on this map, but it was some place east of this shaft and they were headed up that way.

Q. Towards the Ute?

A. Yes, sir.

180 Q. Did you ever examine the Enterprise shaft, with a view of determining what there was there?

A. Yes, sir; last Wednesday or Tuesday, and there is on the surface about a foot of mineralized matter, quartz, and one thing or another and in the bottom of the shaft there was about 2 inches. There was some men shooting in the shaft when I left.

Q. Howdid it run down?

A. In a sort of a wedge shape.

Q. The wall rocks gathering and closing out the vein matter?

A. About two inches thick in the bottom.

Q. Everything in the shape of vein matter in the bottom was 2 inches?

A. That was all I could see. They went to shooting there. I don't know what was the result.

Q. To refresh your memory I will ask you whether you were with Mr. Mills and myself when I replaced this original side-center stake on the Monitor the other day.

A. Yes, sir.

Q. That would bring you down to a lower point than you testified?

A. Perhaps it would.

Q. Will you state what was the character and appearance of this stripping along here near to where that original side stake of the Monitor was?

A. I didn't see much vein matter—sort of a seam. Sometimes there might be a little quartz. I don't remember seeing much.

Q. You may state whether, as far as you have examined it down through here, that is such a vein as an experienced miner would stake as a vein at all.

181 A. I did not see any vein from that point down here. I did not see anything I should say is a vein and from here down I didn't examine it enough to express my opinion.

Q. How would it be with reference to this vein or the croppings in this ditch—with reference to its apparent value—is it good for anything?

A. We come down here from this point and you would find sometimes 6 inches of quartz and sometimes it would pinch out altogether, and here there was about a foot of quartz, and from here on down I did not follow it.

Q. At that point where there appeared to be a foot of quartz did you knock off the rock so as to be certain it was quartz?

A. Yes, sir; I am certain it was quartz.

Q. When you first saw the Monitor discovery shaft what sort of a building was there on it?

A. A log building.

Q. Anything else?

A. When I worked there there was a log cabin about 10 x 10, probably 6 feet high; there was a windlass over the shaft, and that was just about the improvements. There was a pile of rocks in the corner. It was a heavy wooden windlass. I moved the windlass away and left one standing that is there to-day.

Q. I will ask you whether there was, when you first saw it, a tub there.

182 Objected to by plaintiff as immaterial and plaintiff admits there was a tub.

Cross-examination:

Q. As the result of your work up there aren't you in some doubt as to where the Monitor vein runs, whether it runs down in here or down in that direction?

A. I know that it comes in that direction. I know it comes right here. All the doubt in my mind is from there to there. They both come in one crevice down to there, "O." I don't think any person could tell. Here is one crevice right here and one here. This is the strongest vein of the 2. The indications would be that it would go this way.

Q. And yet this is a crevice? As to whether this is the Monitor

vein, you said you can start at the discovery shaft and you can go down there and go on a body of mineral all the way.

A. Right in there.

Q. Can't you come down there to the point of intersection and then go up there and go on quartz all the way?

A. Yes, sir; you can go from that shaft on quartz down to here and from that shaft down to here.

Q. Isn't that the straightest vein of the 2? Isn't it straighter from there to there than from there to there?

A. It would make the straighter line undoubtedly.

Q. As to what there is from there down to there you don't
183 know because there are no excavations for the purpose of showing what is in it?

A. All the excavation is right here. They had been blasting there before I left, and that is all I see.

Q. Right there there is about 4 feet of quartz?

A. Just about there.

Q. You were working down in the Monitor shaft?

A. Yes, sir.

Q. What is the character of the rock you found between the walls?

A. It is a pretty hard solid quartz.

Q. Did you notice what is on the dump?

A. I help take it out?

Q. What is apparent on the dump? Is it not country rock, decomposed porphyry, with little veins of quartz running through it?

A. I don't think it is. I did not examine the dump. It was the bottom of the shaft I was alluding to.

Q. There has been none of the contents of the shaft taken away that you know of?

A. I could not say.

Q. As to what is down here you have no opinion?

A. No, sir.

Q. As to what is up there you have no opinion?

A. I have seen those holes, but I am not throughly enough acquainted with it to express my opinion.

ZENOS SNOWDEN, recalled for defendants, testifies as follows:

Q. You have already stated when you first became ac-
184 quainted with Ute mountain?

A. Yes, sir.

Q. Did you ever examine the Monitor vein with a view to tracing its course?

A. I have a portion of it.

Q. When were you last on the ground?

A. This morning.

Q. This represents the Monitor discovery shaft. Do you understand this map?

A. I think I understand the map.

Q. Where, in your judgment, does the Monitor vein run from the discovery shaft down the mountain?

A. In that shape.

Q. What is the point of the compass to which it runs from the discovery shaft?

A. Well, I should suppose it runs southwest.

Q. How much quartz is disclosed in that vein running down the mountain; how much can you see?

A. Here is the shaft, I think; I think 20 or 25; it is not uncovered and the dump lying on it. Down this way, very near to the backbone, I should think, the vein where the openings are would average from 15 to 20 inches; 12 to 14 inches of quartz.

Q. Quartz?

A. Yes, sir.

Q. And vein matter including quartz?

A. Take the whole average, it is about my figure; what I would call vein matter.

Q. What amount of quartz can you see in "O," the cut where there is a vein in each end of it?

A. I think in this end, the southeast, I should take it to
185 be, there is about 2 feet of quartz, and here I don't remember, but, lead matter and all, I think there may be 20 inches, and there may not.

Q. Which is the stronger vein?

A. I should take this vein in the southeast.

Q. Which, in your judgment, is the Monitor?

A. I should take this one in the southeast.

Q. Did you examine the ground from that point on down the mountain to see whether there is any vein matter in sight?

A. There has been some work done along in here; there is more here; in fact I don't remember much about the hole; it is the first above the wagon road; the second hole, it seemed to me, a slip in the rock of vein matter. I don't think it amounted to much. I think the vein is to the right going up the hill; what I take to be the Monitor vein.

Q. Did you see a ditch come off from this direction towards the wagon road?

A. I can't place it.

Q. Without reference to the map do you remember examining a ditch there or several places where there was ditches dug along in the surface of the ground?

A. I examined different workings from here up.

Q. What I want to ask about is the appearance below "O," whether you found any vein or spur running off from the Monitor, any evidence of one, any vein matter.

A. I don't remember about it. Here I remember, but
186 down here I don't remember whether there was one at all. The lead I didn't think was uncovered at all; there was what I call a seam in the rock; which way it runs I couldn't say.

Q. Did you ever examine the cut "*d*" and the old Rachel discovery shaft?

A. I have examined those down here, but never thoroughly.

This open cut below the road I examined; there was, I call, 18 inches to 2 feet of quartz there.

Q. What is your opinion as to that's being the same vein as the Monitor?

A. My opinion, as near as I can see from what is opened, the course of the lead in this open cut and the dip of it would convince me it is the Monitor vein.

Q. From the Monitor discovery shaft down over the cliff here did you see any workings?

A. I did not go down. I was over it last term of court.

Q. How does it appear with reference to whether there was a vein there or not?

A. I took it to be a feeder either from the Ulè or Monitor vein.

Q. Does it run up to the Monitor vein?

A. When I was up along here, if I remember right, it was not stripped and I could not determine.

Q. You saw it to-day, didn't you?

A. Yes; but didn't go down.

Q. Is it stripped up close to the Monitor now?

A. Yes, sir.

Q. Any indications of a vein running through there?

187 A. I could not see any. In my judgment, I should think that seam or strata would come in below if it come in at all.

Q. What is your judgment as to whether it would come in at all?

A. The strip looks as though it might come in; I couldn't say.

Q. You were not over the ground down here?

A. No, sir.

Q. Did you examine the vein from above the Monitor discovery shaft?

A. Didn't notice the vein at all to amount to anything.

Q. Did you examine this vein? You recollect a ditch below where the Enterprise spur comes into the Monitor following down the Monitor; do you remember a ditch came off here to the left?

A. I believe I do, if that represents it.

Q. Did you go down along there?

A. I did not to-day.

Q. What was the appearance at the point here where it comes off?

A. It seems to me that the Monitor vein went straight ahead.

Q. How much of a spur did there seem to be striking off to the left?

A. I didn't notice that very particularly to-day; didn't pay much attention to it.

Cross-examination:

Q. You could see from there that very considerable work had been done along there since the last term, could you not?

A. The time I was up there last year there was a great many men *were* working.

188 Q. Didn't it strike you that a great deal of work had been done there?

A. I couldn't see.
Q. Yet you didn't go down along there?
A. No, sir.
Q. From the stripping done there you are inclined to think that this comes in here?
A. I should suppose if it come in at all it come in along here somewhere.
Q. What is your judgment as to whether it does come in or not?
A. I think it does. I think it comes into the Monitor vein very near square. I should take its course to be down the hill southwest after crossing the hog-back.
Q. Doesn't this look, commencing there, like a straight continuous vein right on through into the Enterprise shaft?
A. Stand on it and look at it straight, the lay of the country convinces me. In crossing a little swag here it would be laid over a little.
Q. To walk along it don't it look as if this was a separate vein coming in and joining with the other?
A. According to my theory, I think it comes in down there.
Q. Up here you did not go?
A. No, sir.
Q. You did not pay much attention to anything below except that cut "*d*"?
A. No, sir.
Q. You come down there and you recollect that long cross-cut?
A. I think I stated that I think the lead is off to the right.
Q. I am talking about that long cut that runs right down
189 to a point.
A. I don't remember much about that.

JOHN MCMAHON, called for defendants and sworn, testifies as follows:

Q. Where do you live?
A. Lake City.
Q. How long have you lived there?
A. Well, I came here in the fall of 1876 and I lived here till 1878 and then I went to Leadville and I staid there till the spring of 1880 and come back here and have lived here ever since.
Q. How long have you mined and prospected?
A. I have been around mines since I have been 9 years old.
Q. What is your business?
A. I follow mining and prospecting.
Q. Where have you mined and prospected?
A. Hinsdale county; and I have prospected and mined in Georgetown.
Q. Where else?
A. Silverton for 18 months.
Q. Have you ever been on Ute hill?
A. I have, sir.
Q. Were you ever at all the openings indicated on that map?

A. Well, I think I was.
Q. When were you first there?
A. The time of the other court.
Q. You were one of the jurymen on the other trial?
A. Yes. sir.
Q. Who took you to these openings?
A. Mr. O'Brien, and I disremember the other man's name, and Sheriff Campbell; they claimed it was all the openings there was.

190 Q. Have you ever been there since?
A. Yes, sir; I was there to-day about 3 o'clock.
Q. Were you up at the Monitor shaft?
A. I was, sir.
Q. What is the size of the vein as disclosed in the Monitor shaft?
A. I should judge that the Monitor shaft is between 4 and 5 feet from wall to wall.
Q. Did you look down the shaft?
A. I did, sir.
Q. How far down did you see?
A. I think I saw at least 40 feet.
Q. What is the dip of that shaft?
A. Well, it starts down first pretty near straight; when it gets down about 20 or 25 feet it has quite an angle.
Q. Did you ever go down?
A. No, sir; no further than to step down.
Q. In your judgment as a miner, where would the dip which that vein has as exposed in the Monitor shaft carry it on going down Ute hill?
A. I think it would carry it down what is claimed as the Monitor vein.
Q. Point out to the jury the course of the Monitor.
A. I think it would come right down in that direction.
Q. How far is it stripped so that you can walk continuously on quartz from the shaft?
A. I think it is stripped at least 100 feet.
Q. You were at this long cut "O"?
A. Yes, sir.
Q. What does that disclose?
A. In this end it discloses, I think, about from 10 inches to 20 inches of quartz—the Monitor end—and besides that there is a large stain there, and on the other end is the Annie, as I under-

191 stand it; it shows about 10 inches of stained porphyry; I couldn't find any quartz in it; Mr. Clawson and I both looked.
Q. Below that what opening did you see?
A. I saw a long opening here. I couldn't see anything like a vein in either one of those openings.
Q. What do you say as to this Monitor vein coming down here crossing the Annie vein?
A. I don't think it does.
Q. Are there any indications of crossing?
A. No, sir; not in my judgment.

Q. What is the strength of this Monitor from "O" up to the Monitor shaft as compared with the strength of the Annie from "O" to "K"? Which is the heavier vein?

A. I think the Monitor is.

Q. What is the width of the Monitor down here?

A. I should judge it is from 2 & ½ to 3 feet to about this point and after that it isn't so large until it gets down here, and after that I think it is very nearly as large with the stain and all.

Q. Is there an opening here?

A. Yes, sir.

Q. What does that pit show?

A. I think it shows the same vein.

Q. What is your judgment as a miner as to the Monitor vein coursing down substantially through the center of the entire Monitor claim?

A. I think it goes there.

Q. How firmly are you established in that opinion?

A. So firmly that I am willing to swear to it.

192 Q. Have you ever been here at the Enterprise shaft?

A. Yes, sir; I had a man to-day clean it out.

Q. What did you see in the bottom of that shaft?

A. I could not see anything.

Q. Did you look?

A. Yes, sir; it comes down to a very small seam, and that is all you could see.

Q. What does it show at the top?

A. From 2 to 4 inches of vein matter.

Q. Did you follow this ditch on out?

A. I did.

Q. What did that disclose?

A. Nothing much after we got to the road. Of course, there was some stained porphyry there, and that is all I could call it.

Q. Did you go down on this course that is indicated by this black line marked "*b*," "*c*," and "*d*"?

A. I believe I came up that way.

Q. State what you saw in tracing that through.

A. The vein starts from the Ulè here and shows, right where it starts, 2 or three little streaks of quartz from ¼ of an inch to ½ an inch, and after reaching "*d*" I don't think I saw any more quartz until you come up there to a little bluff of rocks, and there are two men working, and it don't even show a seam from there to there. It shows nothing there but country rock. There isn't even a seam. If anything the seam runs the other way.

Q. Were there any men blasting up in here?

A. That is where I mean. It is right close to the Monitor vein.

Q. Is it where they are working to-day?

A. Yes, sir.

193 Q. What is the relative strength of this vein called the Enterprise from the shaft down to the so-called junction and the Monitor down to that point?

A. This is a very large vein down to the junction and this is a very small one.

Q. Were you down on the course of this ditch that is taken out there?

A. No, sir; I don't think I was. I was last spring, but I disremember how it was then. I ought to have gone down there to-day, but I forgot all about it.

Q. What do you say as to this vein being the same vein continuously on down through?

A. I think it is.

Q. How does the quartz crop out above the Monitor shaft?

A. There is a big blow-out up there, but really I can't say how it did look. I did not examine it closely enough to testify how it did look.

Cross-examination:

Q. I believe you stated you were a juror on the last trial of this case?

A. I was, sir.

Q. As a juror you were required to assume a position on one side of this case?

A. Yes, sir.

Q. And I presume that was in accordance with your convictions?

A. Yes, sir.

Q. And you are naturally testifying in accordance with your views then?

A. Yes, sir.

Q. You still believe you are right?

A. Yes, sir.

TIMOTHY CLAWSON, called for defendants and sworn, testi-
194 fies as follows:

Q. Where do you reside?

A. Burrough's Park.

Q. How long have you lived there?

A. About 7 years; mostly made that my headquarters; have not been there all the time.

Q. What is your business?

A. Well, I have been mining mostly for several years.

Q. How long have you been engaged in mining?

A. 15 or 16 years.

Q. Where have you been following that business?

A. Various mining camps. I commenced in Montana Territory.

Q. Where else have you mined besides Montana and Colorado?

A. Very little in Idaho; more in Wyoming than any other particular place. I was 6 years in Wyoming, at Sweetwater.

Q. How long have you lived in this county?

A. Since 7 years ago last June.

Q. What have you been engaged in since that time?

A. Mining exclusively; in fact, I have done nothing else to speak of.

Q. Are you acquainted with the Ute hill?

A. Some acquainted with it; yes, sir.

Q. When did you first become acquainted with that mountain?

A. In the winter of 1875–'6; more acquainted with it in the spring of 1876, along in April and May and about the first of June. I went there, it might have been, in April, but I was there a
195 good part of May; camped there.

Q. Where?

A. In the old McConkey cabin.

Q. What were you then engaged in doing?

A. I was prospecting some. I worked one assessment there, too. I was there for another party.

Q. On what mine was that assessment worked?

A. I think it was called the Metropolitan. I worked it for Frank Curtis. I don't know whether it was ever recorded or not. McConkey located it.

Q. Where did you work that assessment?

A. If I remember right it was right in this corner, barely outside of the surface ground.

Q. Where did that vein run?

A. Well, it run pretty straight up and down the hill, if there is any vein there.

Q. What else did you do at the time you were camped there?

A. Well, I was prospecting that hill some.

Q. Where did you prospect on that hill?

A. I prospected more particularly on that hill in the neighborhood of that Monitor shaft. I prospected by looking over it. I did not dig a great deal where the country rock was exposed. You could follow the country rock all round that hill.

Q. Try it with a pick?

A. Some; not a great deal.

Q. You have been at the Monitor shaft?

A. Yes, sir; the first giant cartridge I ever exploded in the San Juan was in that shaft. That was about the first of June, 1876.

196 Q. Who was you assisting?

A. McConkey.

Q. How deep was the shaft at that time?

A. Well, I couldn't say positively. I never measured it, but he told me it was 50 feet, and I didn't see that it was any great amount short of that. He had a contract to sink it 50 feet, and I understood it was completed.

Q. How deep was it when you left work?

A. It was never sunk any after by him. He had really stopped sinking and I went to help him break into the vein.

Q. How long did you work there?

A. Only a short space; was not hired. McConkey never had used any giant powder to speak of and he wanted me to go in and help him break through that vein.

Q. What was the depth of that shaft?

A. I should think it was anyhow 40 feet and my impression was 50.

Q. Using windlass?

A. Yes, sir.

Q. Troubled with water?

A. I don't think the water troubled but very little at that time. There was some water.

Q. What appears to be the character of that vein down at the depth of 40 feet or 50 feet?

A. It had a very hard shell on the side that we started to break into and we did not succeed to break into that very well. After we got into it a ways it was very soft, so that powder would not do any good. We fired several shots and managed to get a hole through, so that we got out a part of that soft vein matter.

Q. How wide was that vein?

197 A. We got in at least 18 inches, I should think, but we did not get back to the hanging wall.

Q. What is the pitch?

A. It might be anywhere from 20° to 25°. I don't think it was over 25° from a perpendicular.

Q. Which way does it dip?

A. To the west—northwest, I should call it.

Q. Into the mountain?

A. Dips into the mountain right there by the shaft. Possibly over the ridge it would be dipping out.

Q. How wide is the vein at the top of that shaft?

A. Right where they made their level place to start the shaft it was a pretty good vein. It might be anywhere from 2 to 4 feet; then down in the shaft for a number of feet I couldn't say as to the width.

Q. In your judgment as a miner, what direction would the pitch or dip that vein has as disclosed in the shaft carry the vein in going down the Ute hill?

A. Well, looking down the hill it would carry it to the right or to the west.

Q. When were you there last?

A. I was there to-day.

Q. Were you at the Monitor shaft at that time?

A. Yes, sir.

Q. What stripping is done in the direction of the vein beginning with the Monitor shaft? How far can you walk on continuous quartz?

A. With the exception of a small space the dump covers, it might be 20 feet out to the lower edge of the dump. From there

198 the vein is stripped several hundred feet. It might be 3 or 4 hundred feet.

Q. Beginning with the Monitor shaft, point to the jury where the Monitor vein courses down that Ute hill.

A. Well, it might depart from that line up there; I don't know. Down in this direction.

Q. Were you a witness at the last term?

A. I was.

Q. This map was then used?

A. A map similar to that.

Q. The same marking you saw on there then?

A. I believe so.

Q. State what you know about a tree at that time having been here at the point of intersection.

A. There was a large tree there.

Q. (?) I don't know. There is one looks very much like it down the hill.

Q. State whether or not this sharp angle that is indicated by these straight — would — a truthful indication of the real course of the vein.

A. Well, I don't know. I should think the Monitor vein—that might represent it down to here; not exactly, either. It occurs to me that it makes a regular gradual curve right in here. As you look down the hill it courses to the right. Right here is a spur that influences the vein without doubt, and it makes a gradual curve right in here.

Q. What spur is that?

A. It represents the Enterprise, I believe.

Q. Did you go to the Enterprise shaft?

A. Yes, sir.

Q. State what you saw. What was the result of your exam-
199 ination with respect to quartz or vein matter or a vein?

A. I would not call it a vein; I would call it a seam in the rock that comes right together and has a kind of a lining on each side of it of quartz. There is no distinct vein of quartz there, although there is some quartz there.

Q. How much quartz?

A. In one place if a man was very eager for quartz he might get 3 or 4 inches for 15 or 18 inches down in the shaft.

Q. How much quartz is there at the bottom?

A. Not any. This seam is stained on each side, but down in the bottom it seems to come together without a trace of it, so far as I can see.

Q. What is the shape of that streak?

A. It is simply a crack running down there.

Q. Is it wedge shape?

A. There is one seam that keeps its course right down.

Q. Did you follow on out beyond this Enterprise shaft?

A. Yes, sir.

Q. What did you find there?

A. The streak looks pretty much the same in that direction as it does right along in the neighborhood of the shaft. Along down here for a ways there is no quartz.

Q. Did you follow it to its end?

A. I don't know whether I did or not.

Q. To the point where they have dug a trench?

A. I did not see any material difference from what there is
200 along here. Right at the end it kind of closes itself apparently, although it may continue on.

Q. Have you ever been on the course indicated by this black line marked "*b*," "*c*," and "*d*"?

A. Yes, sir.

Q. When were you last over that ground?

A. To-day.

Q. Begin with this point down here on the Ulè and go up toward the Monitor shaft and explain the showing of what is called a vein there.

A. Well, I don't call it a vein. That ground there has got those seams in various places. In places it will lose itself and then you find it again on a head till you get up pretty near here and there it loses itself entirely. If it don't lose itself entirely, it bears off to the right. There is a little indication of its bearing off in this direction, but I think it loses itself there entirely. It doesn't even carry its stain there up over this cliff.

Q. What do you say is your opinion, as a miner, as to the Monitor vein continuing in its course from the Monitor shaft substantially through the center of the Monitor surface ground?

A. There is a well-defined vein down here and there is no doubt about its being the same vein.

Q. Did you see the east end of the cut marked "O"?

A. Yes, sir.

Q. What was exposed there?

A. Well, there is a vein there of some kind. It don't look as well, though, as it does along up here until you get down about here. A man might think that was a pretty good vein if he
201 did not look close. There is a vein there, but it is broken up.

Q. Did you examine below this point "O," where the Monitor vein is supposed to cross the Annie?

A. I was where some fresh work had been done. There is no sign of any vein there that I could see at all.

Q. What, in your opinion as a miner, is the course of the Monitor vein from this point?

A. I am not convinced in my mind that you have got it explored there. I believe it is to the east of that. There is a kind of swale there. The ground begins to soften up, and I think you will find the Monitor vein will follow that swale on down and that will carry it east to that long hole.

Q. Swale or sag?

A. Kind of sag.

Q. In your opinion, the Monitor vein — from this point, from the end of the stripping. There is a trial pit in there between this stripping and "O;" do you remember what is exposed there?

A. It looks like the vein is exposed there, although it is not prospected enough for a man to tell.

Q. In your opinion, it courses down east of this opening at "O" and continues down in this direction through to the end of the Monitor claim?

A. I rather think it does.

Q. How firmly convinced are you of the Monitor's so coursing down?

A. I have no doubt in the world that there is a plain, well-defined vein coursing down through here and it is in a manner
202 perfect, although broken up by spurs. I have not much doubt, although there is room for conjecture.

Q. No indications of its crossing and cutting over on this west side of the Annie?

A. None whatever that I could see.

Q. Is it your opinion that it unites with the Annie or continues parallel with the Annie?

A. They might unite and run together. That is all matter of conjecture, for they are all covered.

Q. What is your opinion on that?

A. I have none. They might, and they might run close together parallel. I think, though, that Monitor vein is liable to absorb most any vein that comes near it.

Q. State the relative size of the Monitor as compared with the Annie.

A. I don't see any vein here. It is one of those seams that I suppose is represented to be the Annie in the west end of that long cut. It is just such a seam as you will find in a great many places on that hill. If a man was very easy to suit he might call it a vein, but I don't call it a vein.

Q. Have you examined these openings along here?

A. I went over it to-day to see it. That seemed to be on the same streak that this Metropolitan was on.

Q. Where did that Metropolitan vein run?

A. It was not exposed only right in the cut unless this working below is the same. It seems to run pretty near straight up and down.

203 Q. Have you examined openings along on this Annie vein to form an opinion as to its being an extension of the Ute?

A. No; I don't know that I have really. It don't look much like the Ute, though, in the places I did see it. It might be a part of it.

Q. Were you ever above this wagon road that goes to the California?

A. I have been all over that.

Q. State the condition as regards quartz croppings just above that road.

A. There is some croppings above that road.

Q. What do they indicate as regards veins?

A. There is croppings. I believe the Monitor vein don't amount to much from there up. I think it kind of loses itself, splits up, although the principal showing of quartz goes on in the direction 40 or 50 feet. McConkey used to try to show it to me all along up here clear to the Ute vein, but I never see anything to amount to anything further than about 40 or 50 feet.

Q. When did he point that out to you as running up in that direction?

A. In the spring of 1876.

Q. Did you ever examine up in here?

A. Yes, sir.

Q. What is the showing with reference to quartz croppings up in that direction?

A. It isn't very good. I looked through there when I was there prospecting, and I don't remember anything that would warrant saying it was the Ute vein going on down through there. I was satisfied that that thing was pretty badly mixed up along on that break here, so I left it at that time.

204 Q. There are some quartz cropping up in this direction?

A. Oh, yes, sir; you find stains—quite a good deal of stains up in that direction, according to my recollection.

Q. You say that you prospected there in June, 1876?

A. I did most of my prospecting in May. I left there, I think, about the 4th of June. I had a contract with Mr. McConkey.

Q. Did you see any of the stakes of the Monitor mine?

A. I don't remember any stake, only one that must have stood right in here somewhere. It was in sight of where I worked that assessment. That was all the stake I remember.

Q. Don't remember any stakes at the upper end?

A. I think probably I saw them, but I don't remember now.

Q. Do you remember of any of the stakes interfering with any of your locations?

A. I remember the ground was pretty well monopolized that I wanted to go onto. I couldn't locate any of the stakes now except that one.

Q. When you were there prospecting in May, 1876, what course did Mr. McConkey claim the upper end of the Monitor ran from the discovery shaft?

Objected to and withdrawn.

Q. State, if you can, why there is so much country rock shown on the dump of the Monitor, if you know.

A. The shaft is sunk by the side of the vein. I know that very well. Mr. McConkey did not know much about breaking

205 rock, and I was in there before he was down very far, and I advised him to leave the vein and sink by the side of it, and he did so.

Cross-examination:

Q. Do you think you know the reason why so much country rock appears on the dump?

A. Yes; I think so; of course I might be mistaken.

Q. The last material that came out is on the top of the dump?

A. Most likely.

Q. When did you say Mr. McConkey did his last work?

A. So far as I know, it was in 1876.

Q. Were you ever down in that shaft afterwards?

A. Not to the bottom.

Q. Suppose, after 1876, after the defendants got possession of the mine, they sunk the shaft 5 or 6 feet deeper and run a drift on the vein—if that was done you don't know why that country rock appears on the top of the dump, do you?

A. I don't know that I understand you.

Q. The last you saw of that shaft was in 1876?

A. Yes, sir.

Q. And you were laboring under the impression that that was the last that was put on the dump?

A. Yes, sir.

Q. But suppose after that the defendants sunk on the vein and then run a drift?

A. They might have taken everything away. It might have been all pay rock.

Q. Suppose it was not all pay rock? Suppose they put it right on the dump?

206 A. If they put it right on the dump it is a bad showing.

Q. Will you put your pointer on letters "*f*," "*g*," and "*h*" on the Annie vein?

A. There.

Q. You say you looked there and don't find what you call a vein there?

A. I did not say that; I was speaking of this place here. I said I did not examine any of these places carefully enough to talk intelligently about them. I was speaking of that at the west end of that long cut.

Q. Are you pretty hard to please in a vein?

A. As I grow older I am.

Q. What do you call a vein?

A. Well, sir, I call a vein a vein of quartz that is distinct from country rock on either side.

Q. Would that definition answer your understanding; a crevice in the crust of the earth foreign to the inclosing walls?

A. Yes, sir.

Q. How wide must a crevice be to be a vein?

A. No stipulated width.

Q. A crevice may be an inch wide and even yet be a vein?

A. It may be.

Q. It may be even closer and yet be a vein?

A. A mighty poor one.

Q. You locate upon what appears to be a good wide crevice on the surface; you sink 50 feet upon that and it closes up until it is only as wide as a knife blade; you will sink along that crevice perhaps 40 feet and it opens up again. Is that narrow part a vein?

207 A. I don't call it a vein. It is a tracer of the vein, though. I never followed one that far when it tightened up.

Q. Have you seen tight crevices followed 20, 25, 30, 40 feet by men who were a little more industrious?

A. Yes; I have.

Q. Did you have any idea that they had lost their veins simply because their crevice had closed together?

A. No; I don't know as I did.

Q. It is still their vein and they were simply going from one rich body of mineral to another?

A. Yes; it might be.

Q. You say that you think that the Monitor vein passes to the east of what is laid down on that map as the Annie vein below the point "O"?

A. That hole does not disclose the vein, really.

Q. That is the cut in which there is a vein disclosed on each side. Do you say that that cut does not disclose a vein?

A. Yes, sir; I do.

Q. The witnesses for defendants in this case have repeatedly testified that at the east end of that opening there is a vein coming down that shows two feet of quartz.

A. I don't think they have examined it carefully. There are indications, I admit, but when you look at it carefully there is very little quartz.

Q. This cut in which the two veins are exposed, as claimed by both sides, where witnesses have repeatedly said there are two feet of quartz you say they are mistaken?

208 A. My first impression was that there was a vein of quartz, but I have looked at it since.

Q. What is it, country rock?

A. I don't know what else to call it.

Q. You think that vein from that point where it is last seen continues on down to the east?

A. I should look for it there.

Q. It may possibly go down there and it may dip under?

A. Yes, sir.

Q. What do you mean by that?

A. Disappear.

Q. Below the country rock?

A. Yes, sir.

Q. Then you recognize that that vein may be capped over with country rock so that it may disappear for some distance and then appear again?

A. If that veins dips there it never appears on that side of Henson creek.

Q. I ask you if you don't recognize as a fact that a vein may dip and go under the country rock and disappear for a distance and then appear again.

A. Of course, but my experience is when I have seen one dip down towards a prominent gulch it never appears again on that side of the gulch.

Q. Why is it you say that vein may dip? Do you mean by that it may go down and may reappear?

A. No; I don't mean that; I don't mean it would appear again between that and Henson creek.

Q. I am asking you if a vein may not dip and reappear at some point again and be the same vein.

209 A. That depends upon the nature of the ground.

Q. I am asking you if that may not be the case in some ground.

A. It might be so.

Q. You say that in this Enterprise shaft, if a man was eager for quartz he might get 3 or 4 inches of quartz. Suppose he was not eager for quartz, would he find it if he was looking for it?

A. He would see very little.

Q. Does the fact the man is eager for it make the amount of quartz there any greater or less?

A. Yes; I think it does.

Q. You say, as a physical fact, that the eagerness of the man makes the quartz that is there greater or less in amount?

A. It would make two men differ in the amount; it would not affect the quartz a particle.

Q. Then I understand that so far as you are concerned you don't profess to give any opinion as to the Monitor vein beyond that point?

A. No, sir; I do not, if that represents as far as it is stripped; it is a matter of conjecture.

Q. Do you know how far you would sink on that vein that is exposed there before it would disappear as you claim it disappears in the Enterprise shaft?

A. Well, no, I don't; I do, too.

Q. How far?

A. I know that you would have to go further than you would on the Enterprise.

Q. How do you know it?

A. That streak in the Enterprise shaft is a seam without
210 any filling and this is a distinct vein, and it stands up there and shows that there is quartz by itself and it is liable to continue down deeper.

Q. Do you say that the vein that is disclosed upon that side of what we call the Monitor vein is any more distinct from the country rock—that is, the filling is any more distinct from the country rock as seen on the surface than that part beyond is seen between that point and the Enterprise shaft?

A. I do, sir. I say this is more distinct. The quartz stands between the country rock.

Q. And do you say it does not stand above the country rock?

A. There is one little place in here that I think probably it does, but not so prominent.

Q. So far as it projects itself above the country rock, is it not as distinct from the country rock as it is there?

A. No, sir.

Q. You say you were there when McConkey stopped working on the Monitor discovery shaft?

A. Yes; I was there after he had completed his contract.

Q. His contract with whom?

A. A man by the name of Kelley.

Q. Wasn't McConkey the owner of it?

A. Yes, sir.

Q. Mr. McConkey had a contract on his own claim to sink the discovery shaft?

A. Yes, sir; he was sinking it for Kelley. He owned half of it.

Mr. Kelley was paying him for the work entirely. Mr. McConkey made a contract with Mr. Kelley to do a certain amount of
211 work on the Monitor and on the El Paso mine. He was to sink 50 feet on the Monitor for ½ and he was to run 75 feet on the El Paso.

Q. Was he not doing the work for himself as well as for Mr. Kelley?

A. Mr. Kelley had the directing of the work.

Q. You say that he sank by the side of the vein?

A. In the bottom. I don't say he did all the way down.

Q. When you got there you experimented with giant powder?

A. Yes, sir.

Q. Finally you got through?

A. We got through, but we did not break it off from the face of the lead. It would be like boring into a barrel.

Q. After you got through the hard crust, did it run into quartz?

A. Yes, sir; it was a decomposed loose quartz. There were hard lumps of quartz.

Q. Didn't you state that when you went down there and saw the bottom of the Monitor shaft you quit prospecting in that country, you were so disgusted, and that you went down there as much for the purpose of seeing what was in the bottom of the shaft as to help McConkey?

A. I might have said that.

Q. And that when you saw all that was in there you quit?

A. I don't knew whether I said anything of that kind.

Q. Is not that a fact?

A. I don't think that is what made me leave the hill.

Q. You say that the water did not trouble in the shaft at that time?

A. Oh, there was water.

212 Q. The water has filled in since that?

A. I could not say as to that. We hoisted some water out, I remember.

Q. You say that the Monitor didn't amount to much from there up. Does the Monitor, so far as anything of value that you have seen, amount to much from there down?

A. It is a better, stronger vein.

Q. More quartz?

A. Yes, sir.

Q. Find any galena?

A. I did not see any to speak of.

Q. So far as intrinsic value is concerned, is the Monitor vein of any value?

A. It is like a great many leads in this country. I think where that face was made it would warrant doing some work on it.

Q. Do you suppose that out of that entire shaft there was enough taken out to pay for the grease that was used to grease the grindstone to sharpen the tools? Did you ever see anything like silver-bearing rock there?

A. Yes, sir.

Q. Did you save it?
A. No, sir; it did not belong to me.
Q. Did you see any galena?
A. I took out some little pieces of quartz out of that hole that had some mineral in it, and I saw some that had galena in it up on top that I supposed came from there. I could not be positive whether I ever broke any out of that face or not, but there was galena there, I know.
Q. They stopped in a bad place if it would pay them from there down?
A. I suppose so.

Redirect examination:

Q. Would not the definition of a vein as put to you by
213 Mr. Patterson answer a gash as well as a vein, what is known as a gash in the crust of the earth?
A. Well, I think it would.
Q. On the hypothesis of that being correct, how would you define a gash?
A. I don't define it. I have heard of gash veins, but I never had any use for them.

GEORGE MILLS, called for defendants and sworn, testified as follows:

Q. What is your business?
A. I have been engaged in surveying here.
Q. Are you a practical surveyor?
A. I claim to be.
Q. Have you ever made examination of the map that you hold in your hand and compared it with the official surveys of the lodes named upon it?
A. I went up this afternoon to the land office and compared this map with the one there on file in the land office, and I find it to be substantially correct in the outlines of the several claims. I did not draft the plat myself.
Q. Have you examined it so as to be able to say whether it is a correct map of the outline of the lodes represented upon it?
A. Yes, sir.

The defendants then offered said map in evidence, and no objection being made the same was received and is hereto annexed, marked Defendants' Exhibit No. 9.

Cross-examination:

Q. You are the brother of Mr. Mills?
A. Yes, sir.
214 Q. How long have you been here?
A. Since this spring.
Q. You have only aimed to put the boundaries of the claim on this?

A. I did not put them on ; they were there.
Q. Who did put them on ?
A. The plat was given to me. I don't know who put them on.
Q. You don't find it differs in any particular from that map, except that the Enterprise is put on ?
A. No, sir ; I think it is about the same as that map.

Thereupon the defendants rested their case.
Thereupon the plaintiff had sworn and examined the following witnesses and offered and introduced the following testimony in rebuttal—that is to say :

J. W. O'BRIEN, being recalled by the plaintiff, testified as follows :

Q. You have been sworn ?
A. Yes, sir.
Q. How long did you say you have had experience in mining constantly ?
A. I have been actively engaged in mining for 14 years ?
Q. Where are you at present engaged ?
A. Marshall Basin, on the Cimarron.
Q. When did you last visit Ute hill ?
A. This morning.
Q. We are now investigating the location of the Annie and Monitor veins. Will you take that pointer and point first where the Monitor discovery shaft is ?
A. There at "*b*."
Q. Will you show to the jury the vein or lode upon which that shaft is sunk ?
A. In my opinion, as far as it is disclosed, it extends up
215 this way to "*a*" and also "*w*," and it is disclosed to that point there as marked on the map. Then, in my opinion, it is covered over for a distance of 25 or 30 feet, and outcrops along down the mountain there in various places going from there down. In various places you find it pinch up ; just before you get to point "*c*" there is about 8 inches. There it shows more quartz than any place I have seen on the entire vein except up here.
Q. Did you notice the dump of the Monitor discovery shaft ?
A. To a certain extent.
Q. What does the surface of that dump show with reference to the material that has been last taken out ?
A. I would call it gangue matter.
Q. What do you mean ?
A. The filling of the vein that is different from the country rock on each side ; oftentimes it is quartz.
Q. With reference to quartz, in what shape do you see the quartz on the dump ?
A. Mostly crystal-ized in little seams of crystal-ized quartz, something like what I have here in my pocket. There is little vug-s or apertures where the points do not come together.
Q. Where do you get that ?
A. I got that below point "*c*."

Q. On the Monitor vein?

A. On what I claim is the Monitor vein.

Q. Did you find similar material along up in that direction?

A. Yes, sir; a point about 50 feet, I would say, from that point on the map shows quartz something similar to that.

216 Q. Look at that. Do you recollect seeing that picked up?

A. Yes; I recollect seeing the large piece. I don't recollect seeing the small one.

Q. What is that?

A. I would say it was crystal-ized quartz on one side.

Q. Let me call your attention to this that is put upon the map as the Enterprise vein.

A. In my opinion it is a separate vein, entirely separate from the vein that the Monitor discovery shaft is located upon except where it crosses the Monitor. It crosses the Monitor and displaces the Monitor in crossing simply.

Q. In your judgment which vein is the later formation, the Monitor or the Enterprise?

A. We say that the vein that is displaced is the older vein; that is, of course, only an opinion.

Q. As I understand you this vein, in your judgment, is the later or younger vein and displaces that at the point of crossing.

A. It undoubtedly displaces it, because I can start at that point and follow a continuous vein from that point, and as I put the compass on it I found it was about south 40° west.

Q. Did you find any mark that was common to both ends of this Enterprise vein so far as the shape of it was concerned on the top?

A. From here down seemingly it stood above several inches in places and not quite so high in other places above the country rock.

Q. Did you see any difference in that respect between that part of it and that in distinctness and size?

217 A. In distinctness not a particle. I think it is larger at that point there.

Q. Have you any doubt as to that vein there at the Enterprise shaft and beyond being a separate and different vein from the Monitor and made at a different period?

A. As to being made at a different period I could not say, but I unhesitatingly say it is a different vein from the Monitor as disclosed from here to that point. It is entirely different, with the exception of where it crosses it; there, of course, it comes in so close contact with it it would be hard to discriminate.

Q. But as to the oneness of the Enterprise, how clear are you in your mind that that is the vein there that is exposed here?

A. I am as a positive as I can be as a miner.

Q. How clear are you in your mind that this vein upon which the discovery shaft is sunk here is a different vein from the one upon which this discovery shaft is sunk?

A. I am so clear that I am positive of it.

Q. Have you any doubt as to this being a vein that is disclosed from the Ulè up?

A. No, sir.

Q. What do you call a vein?

A. It is a crevice, or you could not call it a crevice really because it is filled up, but it is a different formation from the country rock and continuing usually in almost a direct course.

Q. How is the vein on this side of it as to being in a direct line?

A. You start from "*r*" down to "*a*" and "*c*" and they are
218 in almost a direct line. Here the ground is lower and the vein is thrown out in that way, but I don't say it is thrown out on that account. In my opinion it has been displaced by that vein crossing it.

Q. Does that destroy, in the miners' sense and as miners understand it, the unity of the vein?

A. No, sir; it does not.

Q. Did you look down the Monitor discovery shaft?

A. I went down it.

Q. Did you examine the foot wall as disclosed in the shaft?

A. Yes, sir.

Q. Did you notice the strike of that vein as shown on the foot wall?

A. Yes, sir.

Q. How does the strike of the Monitor vein correspond with the strike of the foot wall?

A. When I was down I put the compass on there and I found the course was about south 10° west, and I found the course on the surface is about south 10° west.

Q. Is it possible that the course of the foot wall corresponds with the course of the vein here?

A. No, sir; it varies at least 20°.

Q. Did you examine this working?

A. Yes, sir.

Q. What is that?

A. Well, I have a different opinion with regard to that from any man I have ever conversed with. I find that right there there is an opening that discloses a vein that dips the other way from the Monitor vein, and in my opinion it is displaced above by the Enterprise vein crossing it, as the Monitor vein is displaced below and
219 lies against the Enterprise, and the dip of the 2 veins would account for it.

Q. Then you think this vein really extends beyond and across this Enterprise vein?

A. I think it does.

Q. Did you examine at point "O" where the Annie and the Monitor or the Annie and the Enterprise enter?

A. Yes, sir.

Q. And the works below?

A. Yes, sir.

Q. What do you find?

A. I find at the east end of point "O" there is a vein. I should say that there was something like 20 inches of gangue matter—I could not call it quartz—and that there is from 8 to 12 inches on the west end of that cut. I also find, in my opinion, where this

same Enterprise vein crosses the Annie vein and displaces it just the same as it displaces this, and it is capped for a distance of 18 or 20 feet and is again displaced at "*e*," where it shows from 5 to 8 inches of gangue material, and there was a piece there that showed some galena, and in following this down I find the same indication of lode material that I find in that.

Q. You last see the Annie vein on the west side at point "O"?

A. No, sir; it shows crevice matter right there at the crossing and it lays right against the Enterprise.

Q. Do you find what you believe to be the Enterprise crossing the Annie at that point?

A. Yes, sir.

Q. From that point down to "*e*" is the ground stripped?

A. I believe it is, but it discloses no vein material.

220 Q. But yet when you come to there you find the vein reforming?

A. I find at point "*e*" as marked on the map vein material; that I would say was the same as at the west end of "O."

Q. So that from "*e*" up to where the Enterprise crosses the Annie vein you find the same condition of things as you find from where the Monitor crosses the Enterprise?

A. Yes, sir.

Q. What does that show and prove to you as a miner with reference to this Enterprise being a later formation than either of those it crosses?

A. As I say, we always claim that the vein that is displaced is the older vein. I would say that this is the later formation.

Q. I will ask you to state whether or not, in your opinion, the Monitor discovery shaft is sunk upon any part of that vein that courses across the Monitor lode and is known as the Enterprise.

A. None whatever.

Q. Upon how many veins will you have to run in order to reach the workings disclosed?

A. I would say 3 different veins.

Q. You would have to run on this and make an angle of fully 20° and follow down on this and make an angle there, so that from the Monitor discovery shaft to the lower workings of the Annie the person who takes them will occupy a portion of 3 veins?

A. Yes, sir; in my opinion.

221 Q. What difference does it make because a vein is wide at one point and very narrow or contracted at another as to destroying the identity of the vein?

A. I don't think on account of its being pinched up that it destroys the identity of the vein at all.

Q. How common is it for veins to pinch up and continue pinched up for a considerable distance?

A. I never mined on a vein yet that did not pinch up at different places and the mineral play out.

Q. Does that hold good on the surface as well as beneath the surface?

A. Well, I would say so. I have had very little experience on surface mining. I have not prospected for 14 years.

Q. Do you find any vein running from the discovery shaft of the Monitor up to the Ute?

A. I never went over the ground from the Monitor shaft to the Ute with the exception of the time I went up there last spring with the jury, and then I made very few examinations.

Cross-examination:

Q. How long have you been here?

A. I was first in Lake City 2 years ago this month.

Q. What have you been doing since you have been here?

A. Mining.

Q. Underground mining?

A. Yes, sir.

Q. What experience have you had in prospecting?

A. As I said, I have had but very little experience for the last 14 years.

Q. What is your age?

A. I am 38.

Q. Then you have had but very little experience in prospecting?

A. I have commenced on a great many veins at the sur-
222 face and developed them until I got to what I called underground working.

Q. Did you testify in this case on the former trial?

A. Yes, sir.

Q. You were on the ground, showing points in evidence to the jury?

A. I, with Mr. Miltenberger, went up there and escorted the jury.

Q. What do you find above by beginning at A and R?

A. I find shafts.

Q. What is the distance between those shafts?

A. I should say about a hundred and sixty feet; maybe a little further.

Q. Two hundred and forty feet, according to the map, from R to A?

A. Yes, sir.

Q. What is the character of the ground in that distance?

A. It dips to the east. It is covered over by the decomposed matter.

Q. Rock slide?

A. Yes, sir.

Q. Considerably broken up all along here?

A. Yes, sir; to quite an extent.

Q. You feel perfectly satisfied that what you see in R is what you see in A?

A. Yes, sir; simply because the ground was not broken up when the vein was formed. I don't say that we have indications right there, but in other places.

Q. Right there, with 240 feet of broken ground, you feel satisfied in stating that you know one and the same vein is exposed?

223 A. I believe they are, because they show the same dip, and also about the same dip there is at B, and they are also in about the same line.

Q. Supposing one was over here?

A. If there was a shaft located here and there and dipping this way the pitch of the foot wall would not indicate that it ran down this way.

Q. Will the dip alone establish what you mean, that the same vein is exposed in those two openings?

A. Not of itself; but when I find that the ground around here is considerably exposed and does not show any veins running across and the course of the foot wall would indicate that it came down here I would say to the best of my belief they were the same vein.

Q. How much of a foot wall is exposed here?

A. About three feet.

Q. Do you think you have the dip of that vein in three feet?

A. I could not tell from the dip for the next hundred feet.

Q. What is the distance from A to B?

A. About a hundred and sixty feet, I guess.

Q. It would be about a hundred and eighty feet by the map. With an open of three feet do you think you can tell what would be the course of the next hundred and eighty feet?

A. If that was the only hole that was opened I would hesitate, but when I find a hole here and three openings in six hundred and eighty feet and they all show the same material and the same dip and the same course I don't have much hesitation in saying

224 they are the same vein.

Q. You have examined the Enterprise shaft?

A. Yes, sir.

Q. What does that show with respect to quartz?

A. It shows the same crystal-ized quartz down in the Enterprise shaft that I find out here, and also down there.

Q. Has there been any work done in the Enterprise shaft since the last term of court?

A. I think not.

Q. Did you not testify on the trial of this case at the last term of this court that there was not quartz exposed in the Enterprise shaft?

A. I disremember whether I did or not, but when I went up there this morning it was my firm belief that I would not find any quartz in the shaft, but I went down in the shaft and found this quartz on the upper end of the shaft.

Q. Did you find any in the bottom?

A. I did not look.

Q. Don't you know it to be a fact that there is no quartz in the bottom of that shaft at all?

A. No, sir; I do not, because I never examined it. Right in the bottom of that shaft there is loose rock. I did not look; I simply

went down in the shaft and made an examination in the shaft for quartz, and the very first I found was this.

Q. You don't know whether there is any quartz in the bottom?

A. No, sir.

Q. You don't know whether there is any quartz on this side?

A. No, sir.

Q. What were you looking for quartz for?

A. To see whether there was any there.

225 Q. For what purpose? If there was any quartz what conclusion were you going to try to establish?

A. Simply I went up on the hill to examine the surface workings there, to determine in my mind whether this vein ran across there or not, and, of course, I was looking at all these points for quartz.

Q. If you found quartz there what did you argue from that?

A. I did not form any conclusion.

Q. It did not make any difference that you found quartz there?

A. Of course not, as far as the vein is concerned, it didn't make any difference. You often find a vein filled up with other vein matter.

Q. What is the depth of that shaft?

A. I should say eight or nine feet.

Q. What is the width of what you call the vein at the top?

A. It is very near a foot.

Q. What is the width of what you call the vein at the bottom?

A. I should say there was not very much difference; there may be only six inches.

Q. You don't know whether there is any quartz in what you call the vein at the bottom?

A. I did not examine the bottom of the shaft for the purpose of determining whether there was any quartz there or not. There is only a very thin streak of quartz, not wider than my finger, at the top. The greater part of the vein is what we term gangue and vein matter.

Q. What do you call vein matter?

A. It is material that is different from the porphyry walls there.

226 Q. When you get beyond the road there do you find *in* any more quartz?

A. I find the vein matter a hundred thirty-two feet from the Enterprise shaft and there.

Q. By vein matter you simply mean stain. Do you find a particle of quartz beyond this road?

A. I did not see any.

Q. Where was the last quartz you saw?

A. In the Enterprise shaft, about half way down.

Q. And that was about as thick as your finger?

A. Yes, sir.

Q. In that 80 feet you think it has become strong enough to displace the Monitor?

A. I do not say the filling of that vein has displaced the Monitor.

In my opinion, the crack that was made in the earth at the time—when those cracks were made the earth was hot—and that crack that was so made had displaced this and after this it had been filled.

Q. If we find here in a distance of nine feet that the quartz matter disappears what was there that was hard enough in the congealing to displace this great body of quartz that you find in the Monitor?

A. I said the gangue material was not in there when it cracked. It was the opening of the porphyry that throwed this out, the cracking there.

Q. How far would that cracking throw it?

A. I cannot tell. It seemingly there has capped it over for 25 or 30 feet.

227 Q. If we admit that there was a vein that was cracked open would that prevent this Monitor from appearing here nearer than 25 feet to what you call the Enterprise?

A. Of course it might appear nearer and it might appear further away.

Q. There is a large, strong vein?

A. Yes, sir.

Q. It is at least five feet wide at this point?

A. Yes, sir.

Q. Just above the point of intersection?

A. It is something like that, from 3 to 5 feet.

Q. What was the physical eruption that resulted in carrying away entirely this vein for over fifty feet down the mountain?

A. Of course, in coming through here it could have been thrown aside and it undoubtedly was thrown aside. As the opening was formed there was an opening in the earth and undoubtedly the earth's surface was soft at the time and you always find on one side or the other a displacement.

Q. This is earlier or parent vein?

A. It is the earlier vein; yes, sir.

Q. You say that this earlier strong vein was once formed clear down through here?

A. No, sir; I never said it was all the way down the size it is here.

Q. But it was perfectly formed at one time, was it not?

A. I think it was.

Q. Then that vein was continuous clear down to its intersection with the Ulè?

A. Yes, sir.

Q. Then there came a big clap and broke asunder the earth here and shoved this 50 feet down in this direction?

228 A. I said about 25 feet.

Q. Do you find any appearance of this vein within 25 feet of this point of intersection?

A. I find different material from the country rock.

Q. Where?

A. Along there.

Q. That would make it ninety feet. Do you say that this vein that has only a single inch of quartz in it at the shaft, which is only 80

feet away, in coming down here through this vein has thrown it down the hill before it appears again?

A. No, sir; I said it appears about 25 feet.

Q. You go on record as saying the quartz here is only a finger width?

A. I find that this is principally what we call gangue rock—crevice material—but you don't find the quartz streaks very much larger than your finger.

Q. You said it was hard to discriminate at the point of intersection?

A. I said that it was hard to discriminate there, whether this was a part; that the two veins were not separate. It is hard to discriminate whether there are two separate veins there at the crossings or not, because one crosses the other.

Q. What should make it hard to discriminate if you say that this vein goes right through?

A. Well, I don't know as there would be very much discrimination; that is very true.

Q. What is the occasion in theorizing with any vein down
229 here when you find that you can walk on unbroken quartz from the foot of that discovery shaft to here?

A. This here is not an unbroken quartz; this is an unbroken body of vein material. This lies right ag-in- this vein and is not continuous.

Q. How do you prove it is not continuous? Have you not done some blasting in here?

A. I should not say it was more than two or three feet in depth.

Q. In the 2 or 3 feet that have been taken away from there do you see any indication whatever of the Monitor going off in that direction?

A. No, sir; and if you were to sink there a thousand feet you would not find where the Monitor left at that point, but if you go down the hill you will find it. Undoubtedly the displacement there has taken place a thousand feet down.

Q. What is the gangue material you speak of?

A. It is different material from the quartz.

Q. Is there anything hard enough to displace this vein in crossing it?

A. It was not the hardness, it was the opening of the earth, and, of course, this quartz has crystal-ized and filled in.

Q. You say if you should sink 1,000 feet you would not find it?

A. I don't think you would.

Q. I want to understand you that the top of this book represents the surface ground on which the Monitor running from the discovery shaft down to the point of intersection—we will say that this rule represents a vein running down on that surface ground.
230 Now, do you wish to be understood that here you find there is a thousand feet down where we have no vein, which is represented by this ruler, and a distance of 25 feet between them there is no vein matter even at the bottom of your thousand feet; do you wish to say still that this vein here has jumped over there?

A. That is a very poor illustration. I would say this: Here comes a vein down there perfectly straight, as the surface indications indicate, from the Enterprise shaft down to that point, and that from here down there is a body of gangue material 3 feet wide. This it has displaced and in displacing it has entirely thrown the vein out of its course below the crossing. There is nothing to hinder it from displacing the vein a thousand feet deeper than it is on its present surface, for undoubtedly the mountains are continually wearing away.

Q. What do you say was the condition at the time these veins were formed? Do you say it was all a seething mass?

A. Oh, no, sir; but that is the only opinion that we can sensibly come to, that the earth's surface when this crack took place was warm and was cooling, and in cooling cracked, and in opening it displaced the Monitor vein below the crossing, and afterwards that was filled up by infiltration. It is not always filled up by precious metals or by quartz, but by something that is different from the wall rock usually, and if it has displaced it at that point there is no reason why it should not have displaced it a thousand feet deeper.

231 Q. If the earth was cooling at the time this was made was it not also cooling when this was made?

A. Yes, sir; and this one, too; but this one was made at an earlier period. I would say that you find mineral in eruptive rock and also in sedimentary rock, and each undoubtedly formed at a different time. I claim that this formation is the eruptive, and that while the earth was partly cooled this took place, and afterwards cracks running this way, and these parallel openings were made at the same time.

Q. You say you were in the bottom of that shaft?

A. No, sir; I was down in the shaft about 18 feet.

Q. What number of degrees did you allow as the variation?

A. I did not allow any. I used a pocket compass.

Q. Do you know what the variation is?

A. No, sir; not on that hill.

Q. In order to make an accurate statement you would have to make an allowance for the variation?

A. The compass course was all I testified to.

Q. How do you say you are positive as to the Monitor vein not coursing down here?

A. I was positive as far as I could determine. What I said I was positive about was whether the vein as disclosed in the Monitor was part or parcel of this vein in the Enterprise. There is where I said it was a fine point to discriminate, whether this vein was part and parcel at the crossing, because it was not welded into it. To the best of my belief, I can say that there is none of the Monitor

232 vein material that extends beyond that point there.

Q. That is to the best of your opinion?

A. That is my honest belief; yes, sir.

Q. What do you say is the relative size of the vein on this side of the crossing and on this side?

A. There is but very little difference. There is but very little quartz showing anywhere, but there is gangue matter, and you also find about as much there.

Q. Do you find quartz matter on this side above that point to exceed three to four inches of quartz?

A. I have never testified that I have seen three to four inches in any opening there, but I will say positively that there is more than 3 or 4 inches of gangue matter. I don't think I have noticed any quartz on that vein below that shaft.

Q. Do you mean to say there is no quartz in that opening?

A. Not quartz crystals, without you find it is crystal-ized. There are but very few men who can distinguish between quartz and other vein material. I am not well enough versed to say whether that is quartz down there or not.

Q. If you don't find crystals you can't tell quartz?

A. No, sir.

Q. Do you want to go on the record as saying that you cannot tell quartz unless you find crystals?

A. I say that I cannot determine whether it is quartz or not without I see the crystals.

Q. Then you cannot tell the relative width of the quartz
233 above and below the crossing?

A. No, sir; I cannot.

Q. You say there are three veins down in here. What is there exposed in this cut "O"?

A. I find the same material—that is, from here down to there (the crossing)—about the same character of material, and the same that is exposed above the Enterprise shaft and below the intersection of the two claims, and also down to the east end of the cut at point "O" and still southwest on the Annie vein, between "O" and "E."

Q. You wish to be understood as saying to this jury that what is exposed in this opening here is the same and nothing more, and is what you find in this stripping on up to the Enterprise shaft?

A. I say that the gangue material is about the same as is shown here above the Enterprise and here below the Enterprise and here below the intersection and down here is about the same.

Q. What is the difference?

A. With the eye I cannot tell the difference.

Q. And you wish to be understood as saying that with the naked eye one can see no difference in what is exposed in the stripping down here and on up above?

A. It is materially the same. At places it is more decomposed than others.

Q. Beginning at point "B," down below, cannot a drift from the bottom of a shaft be run from that point up the hill continuously on vein matter running on up to the Monitor shaft?

A. In my opinion, there would be one point right there
234 below where the Enterprise courses into the Annie for 18 to 25 feet from there that has been displaced by the crossing; other than that, it is my opinion you could follow this vein up to

here to where this vein crosses this. I don't claim this vein crosses the Enterprise, but the Enterprise crosses that. If you wanted to turn up there you could.

Q. You would get into the Monitor shaft?

A. Yes, sir; but in so doing you would follow three separate veins.

Q. Did you testify on this point at the last trial?

A. No, sir.

Q. Was not this question asked you?

A. No, sir; you asked me before if, in my opinion, I could start in the bottom of that shaft and follow vein matter down to a point somewhere along there.

Q. To the intersection of the Annie?

A. No, sir; I don't think that was the question, if I remember right.

Q. If you did so testify, is it correct?

A. I would say that I don't think you asked me with regard to following down here. As well as I remember, you asked me if it could be followed to a point down there, and I said yes.

Q. You wish to be corrected if that was your statement at the last trial?

A. Yes, sir.

Q. Did you at the last trial say anything about this Enterprise vein crossing the Annie?

A. That question never arose.

Q. That is something that you have since yourself suggested?

235 A. No, sir; when I went up there this morning I found an opening that disclosed the crossing almost as plain as that.

Redirect examination:

Q. This work here, from there to there, has been done since the last trial?

A. Yes, sir.

Q. And you went up there this morning and found this work done?

A. Yes, sir.

Q. Speaking now of the compass course, Mr. Mills asked you if you took into consideration the variation.

A. Yes, sir.

Q. You took the needle course alone in both and paid no attention to variation in either?

A. Yes, sir.

Q. Mr. Mills asked you about following on vein matter. Where two veins cross and in cross-veins where there is no dispute can you not go upon vein matter to the point of intersection and then go in either direction without leaving vein matter?

A. Undoubtedly.

Q. Does that prove anything as to which is the real vein, the mere fact that you can pass from one to the other on vein matter?

A. No, sir.

Q. I understand you to say that what is disclosed in these various workings is simply vein matter.

A. Yes, sir.

Q. Part of that may be quartz or may not be quartz?

A. Yes, sir; the only way I can determine whether it is quartz or not is by its crystal-ization.

Q. Do you find that gangue matter is always of the same hardness or the same color?

A. Oh, no, sir.

Q. Does that make it any the less the filling and the same
236 vein matter?

A. No, sir.

Q. For instance, you stated that in this crevice that is disclosed as crossing the Annie it is the same matter that you find in this crevice up here?

A. Seemingly.

Q. Do you mean it is of the same hardness?

A. No, sir. In some places it is more decomposed than in others.

Cross-examination:

Q. Is your theory of the displacement of veins formed from book knowledge or actual experience?

A. Actual experience. I would say I never read one word on geology with the exception of Dana's description of crystals.

J. K. MULLIN, called for plaintiffs and sworn, testified as follows:

Q. Where do you reside?

A. Lake City.

Q. When did you first come to Lake City?

A. 1871.

Q. Who discovered the Ute and Ulè?

A. I did.

Q. What is your business?

A. I am running a tinker's shop up here now.

Q. Have you been engaged in mining and prospecting?

A. Yes, sir.

Q. How much of your life have you spent in that business?

A. Ten or twelve years.

Q. First let me ask you if you recollect the sinking of the Rachel discovery shaft.

A. Yes, sir.

Q. It was sunk on Ulè ground?

A. Yes, sir.

Q. Were you the owner of the Ulè at the time?

A. I was one of the owners.

Q. What do you know about permission being given to Simonds and his partners to sink the shaft there?

237 A. Permission was granted them to sink the shaft there.

Q. As a discovery shaft?

A. Yes, sir.

Q. Do you recollect Mr. McConkey?

A. Yes, sir; I was acquainted with the gentleman.

Q. Do you recollect about the time the Monitor was located?

A. Yes, sir.

Q. Do you recollect where Mr. McConkey put the two south end stakes of that claim?

A. I remember the southeast end stake, but the southwest one I would not be so positive about. That was set on the Ulè ground, and I told him to take it off.

Q. Will you show to the jury where it was placed on the Ulè ground?

A. It is along in here somewhere. It was over down below the Ulè vein; over down in there somewhere.

Q. What do you know about the number of times the stakes were moved down there?

A. I believe he moved three times that I remember about.

Q. Tell the jury about where the southwest corner stake was placed.

A. I could not do it. You have got too many lines there for me.

Q. How did he come to move them three times?

A. The first time I told him to take his stake off he moved it around up in here; said there was some good ground in here somewhere and he was going to cover it until he found something.

Q. Do you remember seeing his northeast stakes?

A. Yes, sir; I remember seeing some stakes up in there
238–258 somewhere. I remember seeing a stake up here and a stake up here very near opposite the end of the Ute, and some stakes out in here, too, but I could not locate them now.

Q. What do you know about the stakes being moved up at this end?

A. He told me he had moved his stakes and changed them around so as to cover the ground. He said there was some ground in there and he was going to cover it if he could.

Q. Do you know about the ground up along here?

A. I think I was up over the line where this here mark is made to-day.

Q. Did you ever go about the same ground with Mr. McConkey?

A. We did not go over that same ground there; we started here if I remember right. The old discovery shaft on the Ulè mine is about there somewhere and McConkey came up where we were at work and I walked up with him several times. It is a little harder to walk up there than it is here. We walked up the best ground we could find.

Q. Do you recollect one or more little piles of rocks being piled up by anybody along there?

A. Yes, sir; I think Billy Hall put one pile there and McConkey another.

Q. Were those piles put up about on the line of the Monitor vein?

A. There is a bluff of rocks about in here somewhere between this opening and that other opening that is made there, and

259 I think there is a pile of rocks there and another there, and another pile up here somewhere before that shaft was sunk.

Q. Did McConkey ever say anything to you about where his Monitor vein ran?

A. We were up over it several times. He wanted to know from me which side I thought it went on of that there dyke.

Objected to by defendants. Objection overruled and defendants excepted.

He said some parties had told him that the lead had run one side of the dyke and some the other and he wanted to know what I thought about it.

Q. Do you know what those piles of rock were put there for?

A. Such piles of rocks in generally piled up to denote the line of the lead.

Q. And one of those piles of rocks was put up by McConkey down about in there?

A. I could not say which one it was. There is two little piles of rocks there and another up here.

Q. Will you point out the territory over which McConkey claimed or believed the Monitor lode ran in the early days?

A. He was in doubt whether the Monitor lode run down on the lower side and came into the Ulè vein on the lower side of the discovery shaft we worked, or the upper side.

Q. Was it in the neighborhood of the discovery?

A. He thought it came a little above or below. He claimed my Straddle Bug at one time.

260 Q. Did he claim that his Monitor came down into the Straddle Bug?

A. He said it came down into the Straddle Bug on the other side.

Q. Did McConkey ever claim that the Monitor vein ran down along the line of the Annie vein?

A. Not that I remember of now. After he had made his first location there and changed it round I remember of him having some stakes up here one time. I think at one time he had his stakes set out across there. There was some parties up there prospecting—Esquire Simmons and some others—on the opposite side of the creek and McConkey changed his stakes again; he wanted that ground.

Q. I will ask you if you have gone over the lines that are put down on this map as the Monitor lode and as the Annie lode and as the Enterprise.

A. Yes, sir.

Q. Will you state to the jury where in your opinion as a miner the Monitor lode is?

A. It runs along down here. After you get to that point I am in doubt whether it is this one or that one. I don't think it comes across here at all; I think it is broken.

Q. Did you examine carefully that which is called the Enterprise vein?

A. I looked it over several times.

Q. State whether or not that vein which runs through the Enterprise shaft is any part of the vein upon which the Monitor discovery is sunk.

A. I think it is a vein made at a different period.

Q. And hence separate and distinct from the Monitor?

A. Certainly.

Q. What do you say as to this Enterprise vein crossing
261 and cutting the Annie?

A. It has all the appearance of cutting it off.

Q. Did you notice the crevice that runs right across it?

A. I should judge it cut it directly off; that it is made subsequently to the Annie and to the Monitor.

Q. And runs, separate and independent to both, right across them?

A. Yes, sir.

Q. Did you notice the vein in R and A in line with the Monitor?

A. I have looked at that several times, but not lately.

Q. What is your opinion as to the vein disclosed in those shafts being this Monitor vein?

A. They have all the appearance of being the same.

Q. You say this as a miner?

A. Yes, sir; if I should have found it one place and gone on and dug down and found it again I should certainly have looked for it further.

Q. What is the rule from your experience as a miner as to uniformity in the course of a vein across the country as to its taking a general straight course?

A. It will generally take a direct line. There is exceptions, of course; they may vary in certain points, but the general direction is in a straight line, and if they vary from it they will come back to the straight course again.

Q. Does the fact that a fissure is wide at one point and narrow at another point destroy its character as a vein?

A. Not at all. You always find them that way.

262 Q. Do you find this difference in width upon the surface as well as under ground?

A. Certainly.

Q. Is it an extraordinary thing to find a vein capped over for a portion of it with country rock?

A. It is nothing extraordinary to find one capped over altogether.

Q. Is it extraordinary to find a vein coming to the surface at one point and capped over and coming to the surface at another point?

A. It frequently happens.

Q. Does the fact that a vein which was once an uninterrupted vein has been cut in two by a vein of a later period and a part of that vein displaced—does that, in a miner's sense, make the vein that has been cut in two and partly displaced any but the same vein?

A. That is a matter of supposition, to a certain extent.

Q. I mean among miners?

A. I know you can drive on and you will catch it.

Q. You find frequently faults in veins?

A. Certainly.

Q. Where you will drive on a vein and come to a face of country rock that has been caused by a slip, does that make that any but the same vein?

A. I should consider it the same, of course.

Q. Does the fact that the vein filling or gangue varies in hardness or color or a number of other common ingredients that go to make up the vein matter—does that make that any but the same vein?

A. The construction that I would put on a vein is a crevice filled with crevice matter, let it be what it will.

Q. Is it unusual to find it hard in some parts and soft in
263 others?

A. No, sir; not at all; you will find vein matter in quartz and most everything else in a vein.

Q. And in different proportions?

A. Certainly.

Q. In your judgment the Annie vein has no connection with the vein upon which the Monitor discovery shaft is sunk?

A. I think not.

Cross-examination:

Q. I think you said you located the Ute and Ulè in 1871?

A. Yes, sir.

Q. And you and your partners afterwards sold out to the Crookes?

A. We sold to Lewis Crook.

Q. What year was that?

A. 1876, I think it —; I am not certain.

Q. When did McConkey first come into the neighborhood of the Ute mountain?

A. 1875 or '4; Mr. Phillips can tell you better than I can.

Q. He built a cabin in Ute gulch, didn't he? Do you remember when he built that?

A. I cannot give the date; I know he built it.

Q. Was it soon after he first came?

A. No; he looked around over the head of Henson creek awhile.

Q. When did he first commence prospecting on Ute mountain?

A. The first day he got there. He went up there and said if there was anything left up there he wanted to find it; he didn't find it then.

Q. When did you first hear of his having staked any claims up there?

A. When he told me.

Q. Soon after he first came?

264 A. No, sir; he had been up Henson creek. My impression is Billy Hall had it staked at that time and he couldn't take it.

Q. That is the Monitor vein?

A. Yes, sir.

Q. And that Hall abandoned it and McConkey afterwards staked it?

A. He failed to do the work.

Q. Will you give the date, as near as you can, when you first heard of McConkey's first staking the Monitor?

A. I cannot do it; he told me about it; he had several further up on the mountain.

Q. The Metropolitan was one he claimed?

A. My impression is that was staked afterwards.

Q. He had several different claims staked around that Ute mountain?

A. He had several staked further up on the mountain, and also this Monitor and another claim; whether he called it the Metropolitan I could not now say.

Q. How long after you heard of his having staked the Monitor was it that you heard him say something about changing the stakes?

A. The first time was when he told me he had a stake on there and I told him to take the stake off.

Q. And he did take it off?

A. Yes, sir.

Q. You don't know which year that was?

A. I don't think it was as early as 1873, but I would not be positive.

Q. And you could not state down to how late a period you heard him say anything about changing his stakes?

265 A. About all the changing he done was in that same year; that same summer while I was in there. My impression is that it was 1874. It was all done that summer, anything that I know anything about; I don't know anything any further than that.

Q. Can you point out with certainty whereabouts on this map the original discovery shaft of the Ulè was?

A. My recollection of this map and these leads is that the discovery shaft of the Ulè was in about there somewhere.

Q. How many feet above the present toll road was the original discovery shaft of the Ulè?

A. Probably 150 feet from the closest point of the toll road.

Q. I think you said that McConkey was in doubt as to whereabouts to stake the Monitor lode according to your recollection of the early history of its location?

A. Yes, sir.

Q. Whether to stake it down over the dyke down in this direction or down in this direction?

A. He was in doubt whether he would claim this as the Monitor, or this. He thought this was the one; he had some idea that that

was the one. Some days he would think this was the one and some days that; kind of as the spirit moved.

Q. And the only stake you know anything about being moved was the southeast corner stake?

A. This stake that was out in here. This other stake that was out here I could not locate.

Q. You have recently looked over the ground?

A. Yes, sir; to-day.

266 Q. What is your opinion as to whether there is continuous vein matter on this line down through here to a connection with what is called the Annie lode?

A. Certainly there is continuous vein matter right along down in that direction; this vein matter butts right up against that in the other lead.

Q. What would be your opinion as to whether a drift could be run on vein matter continuously from shaft B up along the course of these veins into the Monitor discovery shaft?

A. From the appearance of the surface if they did not pinch out I think a tunnel could be run all the way unless it would catch into a fault here where the Annie vein has been cut by the Enterprise.

Q. Are you of the opinion as to whether the Enterprise veins cuts through the Monitor at that point or not?

A. I think they both lay together.

Q. You have had considerable experience in underground workings?

A. Yes, sir.

Q. Where one vein crosses another, if I understand you corrrectly, you say it is liable and likely to create a fault in the vein which is crossed?

A. It is very liable to create a fault on one side or the other.

Q. Is it not usual that it creates a fault on both sides?

Q. In some convulsion of nature common sense would teach a man if it throwed both sides away it would look funny; if both sides were displaced at the same time it would be a terrible time around there.

Q. In passing through, the fault would be all on one side

267 and none on the other?

A. That would be the view I should take of it.

Q. How is it in practical experienee?

A. We find the faults only on one side.

Q. You spent considerable time in working the Ute and Ulè?

A. Yes, sir.

Q. Did you find any such faults in the Ute and Ulè?

A. Did not drift any length.

Q. Simply sunk?

A. Yes, sir.

Q. In any of your workings on Ute mountain have you discovered any such faults?

A. I worked on a vein there, but there is nothing in it.

Q. Your experience as to the effect of one vein crossing another is not with reference to any work done on Ute mountain?

A. No, sir.

Q. I will ask you where it was.

A. Down in New Mexico; I was working there, and there was things of that kind.

Q. I will ask you if you have recently been interested in effecting a sale of the Ute and Ulè properties and Annie and other veins to an English company.

A. I started out as an interested party and got left.

Q. So that on the final consummation of that sale you had no interest?

A. I got left early in the fight.

Q. In the final consummation of the sale you had no interest?

A. My partner when he started out went back on me.

Q. That was one Maurice Rich that you speak of?

A. Yes, sir.

268 JOSEPH SIMONDS, recalled for plaintiffs, testified as follows:

Q. Since you were on the stand have you recollected when you did your last work on the Rachel?

Objected to by defendants as not rebuttal and as immaterial. Objection overruled, and defendants except.

A. Since then I have seen a man who did the work. He worked for the man I let the contract to, Dave Edgar.

Q. When was it?

A. In the spring of 1877, in March; the last of March or 1st of April. I think it was the last of March; I let to a man by the name of McKay and Wild Hank. They went up there and commenced to work, and McKay got sick. There was a big snow-storm came on.

Q. Who did the work and what was it?

A. It was sinking a shaft 15 feet for a hundred dollars.

Q. Which shaft was it?

A. It was the shaft below the discovery of the Annie; shaft B on the map. The Annie discovery is point C.

Q. When was it sunk?

A. In 1877; the latter part of March and the first of April.

Q. What do you know about the stakes of the so-called Monitor down at that end in 1876, when you located the Rachel?

A. In 1876. This is the Rachel discovery shaft marked A. On the 4th day of July Charley McConkey came along there and tried to drive us out of the shaft, claiming that it was his shaft. At that time he had the southwest stake setting, I should say, 75 feet
269 southeast from the discovery shaft. When we run the line of the Rachel up here there was one stake there and one over here. One stake here, and up here alongside of the road there was a little quaking asp called the northwest corner stake of the Monitor lode. That is all the stakes I saw at that time. There was a stake here a hundred and fifty feet from the discovery shaft of the Monitor on a little ridge of rocks.

Q. At the time you located the Rachel it was included in the boundary stakes of another claim?

A. I never saw any.

Q. Have you examined the veins there that are in dispute?

A. I have carefully.

Q. I wish you would point out where the Monitor vein is, that vein upon which the Monitor discovery shaft is sunk.

A. I most unhesitatingly say it runs up to point R, down here; she runs down to C B and stops at the Ulè shaft.

Q. You have already stated to the jury where the Annie lode is?

A. Yes, sir.

Q. I wish you would point out any cross fissure or vein that cuts both of these lodes.

A. Here is what is called the Enterprise lode, and right down through here is a crevice I think would cut here and there the ground is not proven. Right here it stops and there is a bank of dirt; here is a long cut, and then there is dirt again. This is the Enterprise.

Q. Will you state why you say that the lode upon which the Monitor discovery shaft is sunk is the one that com-
270 mences at R and runs down through D and ends in the Ulè?

A. You can start right here; at the discovery shaft is a vein seemingly in place; right above the road you see the vein forming, and this is the regular course the vein ought to run; right up here again is an old shaft called the La Fayette, some 12 feet deep, that shows a well-defined crevice exactly on the strike of this vein and showing the same character of quartz. When you get here this lode splits that lode. On the other side it is probably blind or capped over for 20 or 30 feet. Down here it commences to form again, so that you can walk right clean up to within 25 feet of here.

Q. Describe this working below to the jury.

A. There is a body of quartz keeping its course regularly if a person notices carefully.

Q. This joins into the Monitor before it joins the Ulè?

A. Yes, sir.

Q. How well defined is that?

A. That is a good spur.

Q. You speak of a displacement of the vein at that point?

A. Yes, sir.

Q. Do you find a like condition of things in the Annie where the Enterprise crosses the Annie?

A. Yes, sir; the Annie runs right through here at O and comes down here. Right above where the Enterprise crosses is a little quartz, and right here you can see them coming together.

Q. What do you say as to this cross-fissure called the
271 Enterprise cutting both the Annie and the Monitor?

A. It is undoubtedly the fact you can walk right down on it blindfolded.

Q. What do you say as to the Enterprise vein being a separate, distinct, and independent vein from either the Annie or the Monitor?

A. It is undoubtedly. Its course cuts right across both.

Q. You notice in the west end of E what appears to be crevice matter?

A. Yes, sir.

Q. You say that that is really a continuation of the vein you find here?

A. I think it is, because the strike is the same.

Q. For a like reason you discover the fissure across here?

A. Yes, sir.

Q. Is it for the like reason you say that this is a part of the vein that is disclosed here and here?

A. Yes, sir.

Q. As a miner you have no hesitation in coming to that conclusion?

A. None whatever.

Q. And it is for the same reason that you say the vein exposed there and there and there is one and the same vein?

A. Yes, sir.

Q. Is there any reason why you should conclude otherwise?

A. There is not.

Q. Is it anything unusual to find a vein for a greater or less distance capped over with country rock?

A. No, sir. It is always the case; they pinch out and in.

Q. What is the general condition?

272 A. I find most vein matter and most pay where it is open and not pinched.

Q. Which is the rule, to find an open, broad fissure or a pinched fissure?

A. Well, we find it will run 150 feet open and nice and then squeeze up and then come in again all right.

Q. Does the fact that you find the vein matter in some places hard and in some soft, differing in color, with no quartz at some points and quartz at others, make any difference with miners?

A. None at all. I never worked on a vein that I did not find it so.

Q. Did you notice last spring a little pile of rocks that sat up on the bluff?

A. I noticed them. I didn't know what they were.

Q. You heard Mr. Mullin's testimony?

A. Yes, sir.

Q. They were there last spring?

A. Yes, sir.

Q. Is that little pile of rocks right on the Monitor vein?

A. It is a little to one side, not more than ten feet.

Cross-examination:

Q. When did you first see that pile of rocks?

A. The first I noticed it was last spring.

Q. You don't remember who put them there?

A. No, sir.

Q. Nor what the purpose was?
A. No, sir.
Q. Did you testify in this trial last term?
A. I did.
Q. Did you not testify that the vein that is marked on this map as coming down here did not come down to this vein?
A. I did, sir, because this here was not uncovered at that time, nor this was not proven down so far.
273 Q. Is there any stripping done now or trial pits in there sunk since you testified last spring?
A. Yes, sir; this is all open now.
Q. Was not this stripping all done when you last testified?
A. No, sir.
Q. There is a trial pit in there now, isn't there?
A. I never seen it.
Q. Your opinion last term was that it did not come on down here.
A. It never showed itself past here; I testified that I saw no quartz here in this hole.
Q. One stripping falsified your opinion.
A. Because at that time I thought this was a horse; now I don't.
Q. So that you have undergone a change of opinion?
A. Yes, sir.
Q. Do you say you might not undergo a similar change up there?
A. It is now too plain for any man to be deceived.
Q. Is it a fact that there is any vein goes through there?
A. Yes, sir; right there.
Q. Do you know of any seam or any appearance of mineral within less than 25 feet of there?
A. Here is the discovery shaft, and if we follow up on this crevice and we get the same quartz along the strike of the vein it demonstrates the fact that there is a vein through there.
Q. On that hill are veins straight?
A. No, sir.
Q. Is is not an admitted fact that most of the veins on the Ute hill are very bending and crooked?
274 A. They work in and out as the mountain goes, but that is a bend at right angles, almost.
Q. Do you say that is a right angle? Is it any sharper than this angle here?. Here is another very sharp angle; which is the greater?
A. I should say this.
Q. I will ask you if at this point there is not a flag standing on a point of rocks.
A. I don't know.
Q. I will ask you if standing by the side of that flag, if it does not describe a half circle just between the Monitor and this flag.
A. Not quite a half moon; there is a very rugged place here; it is very steep and craggy.
Q. When it describes this circle at this place, isn't there another shoot off in that direction?

A. I don't remember of seeing but one; I followed the one vein—the Monitor vein.

Q. How much quartz did you find?

A. I found quartz and crevice matter.

Q. Do you always have to have crystal-ized matter to determine whether it is quartz?

A. No, sir.

Q. How much quartz did you find along there?

A. All the way from one inch up to four feet wide—quartz and crevice matter.

Q. What was the widest amount of quartz alone?

A. One, two, and three inches.

Q. In your judgment as a miner, is it any more than a stain beginning at the Ulè and from there on up?

A. There is gangue matter and vein material; I never ex-
275 amined thoroughly for quartz; it is mixed with crevice matter all through.

Q. What is the width of the quartz from the Monitor shaft down to the point of intersection?

A. I should say there was—I never broke it open to see.

Q. You could not state?

A. No, sir.

Q. Is there more quartz than there is down on that line?

A. I could not say that, either.

Q. Along here are there not several seams?

A. Seams all over.

Q. What is the character of those seams?

A. They run a few feet and stop.

Q. There are any amount of those seams down in here running in various directions?

A. I never noticed down in here.

Q. At this point here where the half circle was why is it you did not follow that out?

A. I did not see it.

Q. Although you were there for the purpose?

A. Yes, sir.

Q. Have you been in this Enterprise shaft?

A. No, sir; I never was.

Q. When were you at it?

A. Yesterday, about 11 o'clock.

Q. What did you see?

A. This streak of crevice matter forming on the upper side and lower side.

Q. What quartz did you see?

A. Fifteen inches of quartz and crevice matter, I guess.

Q. What would you say was the width of the quartz in the widest place in the Enterprise shaft?

A. I didn't break it up and look to see, but what I call
276 quartz I should say there was four or five inches.

Q. You did not examine the bottom?

A. No, sir; I just looked down the shaft and seen the streak of crevice matter.

Q. You could see the stain there?

A. Yes, sir.

Q. Could you see anything more in the bottom of the shaft?

A. It is some 8 feet down there. I could not see nothing but stained crevice material.

Q. Describe that crevice material; how much of it was porphyry and how much of it other matter.

A. I looked down and saw a difference in the color.

Q. Was there anything in the bottom but porphyry?

A. I don't know.

Q. If there was nothing but porphyry—is not porphyry a country rock?

A. Yes, sir.

Q. Then there would be no crevice there?

A. It might shut out the crevice.

Q. If you saw nothing but porphyry there would be no crevice there?

A. I said that I saw crevice matter running down both sides of the shaft.

Q. Looking down did you see in the bottom of the shaft anything but stained porphyry?

A. I see crevice material, but whether it was porphyry or not I did not get down to see.

Q. Have you not testified heretofore that colors did not count in tracing veins?

A. I said that it did not change my opinion that the vein pinched out.

Q. Did you ever know a true fissure vein to pinch entirely
277 out in 8 feet?

A. Yes, sir; in one foot.

Q. Starting from the surface ground, did you ever see a true fissure vein play out entirely in the distance of 8 feet?

A. I don't remember that I ever did.

Q. At this point of crossing—state what you saw there at that crossing.

A. I see this here streak of quartz keeping its course right along down through here.

Q. Do you say that this quartz does not keep its course?

A. No, sir; I don't see it at all.

Q. What becomes of this quartz?

A. It butts up here and that is the last I see of it.

Q. Can you at this point put your hand on any particle of quartz and say that this belongs to the Monitor and this to the Enterprise?

A. I can put it on the Enterprise, sir.

Q. Just state how far over on that point of crossing the Monitor goes.

A. Right there.

Q. What is the appearance of that end?

A. This here quartz on the Enterprise comes up and that is a

little ridge; this here Monitor comes up against it and seems to break away.

Q. Is it not a fact that the quartz starting here from the foot of the dump at the Monitor continues in unbroken quartz; that this bend is entirely unbroken?

A. No, sir; I think the Monitor is broken, but the Enterprise runs right through.

Q. Do you say that the Monitor does not make the bend there in unbroken form?

278 A. Yes, sir; I say that it does not.

Q. The Monitor juts right up against it in that way?

A. Yes, sir.

Q. You think the joining is clear, well defined, and distinct?

A. Yes, sir.

Q. And that you could discriminate between the two quartz?

A. I think so.

Q. I will ask you what sort of opening there is at "*a*."

A. A shaft 5 or 6 feet deep.

Q. Is it over 3 feet deep?

A. I think it is not on the lower side; it is on the upper side.

Q. On the upper side which wall shows?

A. The hanging wall.

Q. Then on the foot wall you don't have over 3 feet?

Q. From the surface down I think not.

Q. What wall do you have in the Monitor shaft?

A. I never was down; I could not tell. On the surface I think you have the hanging wall.

Q. How much before you come to the cribbing do you have on the Monitor exposed?

A. Five or six feet, I think.

Q. Then you are judging from 5 or 6 feet of the Monitor?

A. Yes, sir.

Q. Then you have 3 feet here?

A. Yes, sir.

Q. How much do you have at "*r*"?

A. That hole is probably 12 feet deep.

Q. At the point "*r*" and between there is not the country very much broken up?

A. As you come down from here the country is very craggy;

279 when you come down here again it is uncovered and open.

Q. In the bottom of that shaft is there not the appearance of a vein going off in that direction?

A. I think not. I never saw any.

Q. Was not the La Fayette sunk on a cross-vein to the Monitor?

A. No, sir.

Q. When was the La Fayette shaft sunk?

A. I think in 1877. They were working for me and discovered it.

Q. You were never in the bottom of it?

A. No, sir.

Q. Then you cannot say what is the appearance of the vein in the bottom of that shaft?

A. No, sir.

Q. In ignorance of that you still base your opinion that this Monitor vein comes down here?

A. Yes, sir; me and McConkey at the time had an argument over it, and McConkey says, "Joe, I won't bother you on this anyway."

Q. When was that?

A. At the time when they first discovered the La Fayette.

Q. When was Mr. McConkey last in this country?

A. In 1877, I think.

Q. McConkey said it was outside of his side line?

A. Yes, sir; and he would not bother me, and told him I thought he would not. It was never recorded because it come in on the Ute ground.

Q. Upon what theory do you say that this vein courses here and the Monitor does not appear on the other side?

A. I go on facts. I can go on quartz all the way down.

Q. Can't you walk on quartz all the way from there to there?

A. Yes, sir; but not on the Monitor vein.

280 Q. Is not this Enterprise, if it carries its course straight through, an exception to the general rule of veins on that mountain?

A. It would, of course. I never saw one in my life that carried itself perfectly straight.

Q. I will ask you if this vein R. C. D. would not be straighter than veins generally on Ute mountain. Have you not expressed that as your opinion that the Ute made large bends up there? Have you not openly expressed that as your opinion on two occasions?

A. I don't know. It is a broken country.

Q. Can you tell the jury of another single vein on Ute mountain as straight as you mark the course of that vein in twelve hundred feet—can you point out another vein on Ute mountain?

A. There aren't a lode on the hill that runs straighter than the Monitor.

Q. Do you mean to say that this map is wrong?

A. I do not.

Q. How does the course of this Monitor correspond with the Annie?

A. The Annie is in a little ruggeder country and dips a little more.

Q. Which is the more rugged country, here or over here on this side of the mountain?

A. This here as far as rock is concerned, right down in here, is very rugged, but along down here is quite rugged, and then we get a swell of a gulch to follow right down here.

Q. State as a fact to the jury if in every particular with rough sways, precipitous or otherwise—if this side of the mountain is not far more rugged than this.

281 A. It is ruggeder in regard to rock.

Q. At this point here is there any exposure between "O" and this opening?

A. No, sir; right here there is some vein matter right above where this cut is.

Q. At this point here you have the same physical appearance as you have up here at the crossing of the Enterprise and Monitor?

A. It is smaller, but it runs in the same manner. When you come through here there is a little cut running down through here showing its course. This here is not opened, but there is a little cut running through here, but pinched.

Q. Is that the same with this crossing up here?

A. Yes, sir.

Q. Is that the only thing as a similarity between the crossing of the Annie vein and the crossing of the Enterprise with the Monitor?

A. It crosses right through the Annie here. It shows more right here than it does there.

Q. I ask you to tell the jury what similarity there is between the two alleged crossings.

A. This here shows the same crevice with the exception it is smaller.

Q. You say that there is another crossing here?

A. This shoots out.

Q. How do you know that this Enterprise vein at this point does not run down there as much as it does down there?

A. Because you walk right down there and it keeps its course and a little spur shoots off here.

Q. And how are you able to say which is which?

282 A. Because it is not broken at all.

Q. Is what goes off in this direction broken?

A. It ain't broken; it goes right off here.

Q. Then, how can you say to this jury which is which?

A. Because this keeps its course and you cannot see where that forms, but it goes off there.

Q. Then this may be made up of Enterprise quartz as much as this?

A. It is hard to tell.

Q. If this did go off in that direction, then your Enterprise would not go off here?

A. If it took the Enterprise with it it would not. It goes off here, but it don't break the Enterprise at all.

Q. Is it not about as wide as it is here?

A. Very near, but it don't break the Enterprise crevice at all. The quartz still holds its size clear through, but it starts off from some unknown cause which I am not able to explain at all.

Q. Who started that shaft "*j*" in the upper end of the Monitor?

A. That is the deep shaft—the 20-foot shaft. Mr. Langmison and a man by the name of Kay started that in 1876 and worked it down and quit it because they said we had the Rachel and they would not interfere.

Q. Is there any difference between the exterior lines of the Rachel and the Annie?

A. I cannot tell that; the location is a little different.

Q. That "*j*" shaft was entirely off from the Rachel ground as you had staked it?

A. I could not tell you that.

Q. It is off from the Annie ground?

A. Yes, sir.

283 Q. You heard the testimony of Mr. Abbott that the Annie was the same as the Rachel, except that it was up the hill a little further?

A. No, sir; I was not in the court-room.

Redirect examination:

Q. You say that there are curves and bends in the veins?

A. Yes, sir.

Q. Don't the veins keep the same general course?

A. They do.

Q. Illustrate it by this bend here; from that point down to that point is there not a very decided break?

A. Yes, sir.

Q. And is it not that which produces this bend?

A. Yes, sir.

Q. And right here in the Annie don't you have a very deep swag?

A. Yes, sir.

Q. When you get upon the regular dip of the mountain side don't you have the veins keeping the same general course?

A. Yes, sir.

Q. And is not that the general rule?

A. Yes, sir.

Q. The question was asked you if you ever saw a true fissure vein play out in 8 feet? Do you see anything of any vein playing out on Ute hill that has been exposed here?

A. No, sir.

Q. Can any one tell, so far as any developments are concerned, whether when you got down 8 or 10 feet it would not present the same appearance?

A. Nobody could tell until they would sink.

284 Cross-examination:

Q. Can you state whether the dip of the Monitor vein at this point, there being a swag here, would not carry that up the other way instead of up that way?

A. That is a prominence.

Q. Does the swag carry it this way?

A. Yes, sir.

JOHN J. CROOKE, recalled for plaintiff, testified as follows:

Q. Have you examined the various veins and fissures upon the Monitor and Annie ground?

A. Yes, sir.

Q. I wish you would take the Monitor vein, the Annie vein, and this cross-fissure and give to the jury your examination?

A. Last spring I was on the Monitor and there is a shaft contains quartz, a very good showing. Come down here there is a shallow affair, about the depth of my cane, shows vein rock. Come down here you get on this side and it is quite a display of quartz. Below the shaft-house there is a width of quartz 2 or 3 feet or more. You go down the shaft and you can see the evidence of something there that looks like a vein. Then you go on down here—here is quite a showing of quartz—until you get to this Enterprise. There the Enterprise comes through here. There is a good line of demarcation between this and that. Then you pass on here and you have rock; it is not true country rock, however. It is an igne-us porphyry. Within 3 or 4 feet from the Enterprise vein there are some strings of quartz showing a continuation of the vein. There are
285 two strings of quartz. Then you go on to the point of rocks; there, of course, the vein stands higher. Then you go on down and you begin to have the appearance of vein rocks and all those characteristics; in some places quartz 6 inches wide—what I call a very good showing of quartz—and you keep on here until she empties into the Ulè vein. Then we come here; this is a spur from the Enterprise. It empties into the Monitor and Ulè afterwards. It shows mineral; a very nice lead. Then you keep coming—you follow quartz nearly all the way—and it empties into this little affair here. This little vein shows a different strike from this; it is evidently a spur. Then we start here on the Enterprise. There is 3 or 4 feet of quartz up there, and you come on down the vein, well defined, right along. Any man that is not morally and physically blind can see right straight down to the Enterprise shaft. You go down into the Enterprise shaft. There is a vein two to two and a half feet wide; it is metamorphosed porphyry. It is one of those characteristic things that do not belong to country rock; it is properly a vein. As you examine the shaft of the Enterprise you will find quartz; some there 3 inches wide—that is, about half way down. Then you come down to the bottom of it and you will find a quartz string running all the way to the bottom. The rock has not been all blasted away onto the wall. Then you go on down and you will see a comb of quartz all the way just like this,
286 and when you come to the crossing there is a well-defined line. She cuts right straight across. There is a wide difference of appearance. It is true colors do not count, but formation does. Then you come down here and this thing has been opened all along down through here. The last opening on the former trial was a little pit in which I thought there was a boulder and it turned out to be a vein. I got down (there was a little shelving cut) and I examined that thing closely. It was about the size of my head, but if I had put my compass on it right away, which I should have done, I would have seen that the course (?) ran northeast and southwest, but I foolishly neglected to do that and that is a warning to younger men. That turned out to be a part of this vein, and then

you go on down here and come to this cut, "*o*." There is lots of quartz in there; you can see it plain. Quartz is seven in hardness and steel is six. You can scratch it and see for yourself, and it has been uncovered. This is a cross-vein. I believe you can see a cropping down here on the road somewhere.

Q. You say that colors don't count, but formation does?

A. Yes, sir.

Q. What is the formation that is plainly discernible on this cross-vein that convinces you that this is a separate vein?

A. There is a very beautiful distinct roof of quartz all the way along.

Q. You can follow on that roof right along, cutting across
287 the Monitor?

A. Yes, sir.

Q. What do you discover as to the color of the rock that is on this southeast side of this Enterprise?

A. It is almost a dolorite.

Q. How is it as to being stained with iron?

A. It is superficially. It is not trachite or porphyry; it has been overflowed there.

Q. If you get low enough on a vein to get the true strike of a vein, how will that strike carry you?

A. The strike has got to be at right angles to the dip; it cannot vary from that. A great deal of this rock on the surface is brought about by water and ice having removed the surface. The dip causes the apparent deviation. The ice was on that mountain probably a mile thick.

Q. Have you any doubt in your mind as to this being the lode upon which the Monitor is sunk?

A. No, sir.

Q. How clear are you that this Enterprise crevice is a younger vein than this?

A. It certainly is a younger vein; as Mr. Mills says, a baby vein. After this was formed then there came disturbances and opened it again and this was formed.

Q. When was it we had that big Mississippi earthquake?

A. I don't remember.

Q. Fissures are made in the earth at different periods?

A. Oh, they are; that is an established fact. The probabilities are that this whole country has been up and down, to say nothing of the ice.

288 Q. How common is it to find well-defined veins opening out for a considerable distance and then pinching out?

A. Find that sometimes. It is a good vein that will keep its average. When they narrow up they will make again if it has good power.

Q. Does that make it any less the same vein?

A. Oh, no; we ran on the Ute over 40 feet that we had apparently nothing.

Q. Simply a seam?

A. They kept their course. I don't know whether they had a

seam or not; it was a little slit of gouge kept its way, if I remember right.

Q. How common is it to find a vein capped over with country rock on the surface?

A. I know the Ulè is.

Q. Does that make the point on each side of the capping any less the Ulè?

A. O, no; I know another case of blind vein.

Q. Does the fact you may find a capping over this Monitor vein make it any less the Monitor vein?

A. Oh, no.

Q. How do you know and why do you know that this Enterprise is a vein of later formation than the Monitor and Annie?

A. Because she cuts right across that and you can see the line of demarcation, especially on this side. There the line is obliterated by the overflow of igneous rock.

Q. You spoke of this little cone. Is not this cone as distinct and discernible at the point of intersection as it is on this side of it?

A. Yes, sir.

Q. Did you notice the strike of the Monitor down in the
289 shaft? Did you see the foot wall?

A. It was cut through the foot and a lot of stuff left on the hanging wall.

Q. Do you recollect at the last term of taking the strike of the Monitor vein with the compass from the surface looking down into the shaft?

A. Yes, sir; I remember that.

Q. How did that strike carry you?

A. Right along that vein.

Q. Would that strike carry you on a vein running in that direction at all?

A. Oh, no; I remarked that, and said that settled the direction of the vein.

Cross-examination:

Q. You testified at the last term?

A. Yes, sir.

Q. You then testified that there was no vein running down through here from the Monitor discovery shaft to point "o"?

A. I testified without any reservation that there was no Monitor vein running down there.

Q. Were you not very positive in your mind that there was no vein running down through there?

A. It was not uncovered, and I could not testify to anything of that kind. I testified that the Monitor vein did not run down through that. The Ute vein is a steady vein; it does not turn any sharp corners.

Q. Didn't you testify in the early part of the trial that there was no vein across that porphyry dyke?

A. No Monitor vein, because the vein was there. It was stripped. I paid the bill; I ought to know.

290 Q. Do you pretend to say you paid the bill for stripping?

A. I paid several hundred dollars for doing the whole; all the work here.

Q. Was it not your aim to show that it turned off down here?

A. We worked this and we worked up through here, too. We had men work down there night and day. We were going right on to show the truth of this thing. Good Lord! if this was your vein you might have it. I know I paid hundreds of dollars for the stripping up here and down there and here and on your vein here.

Q. Is there any vein at all down through just below where your Enterprise vein crosses what you call the Monitor?

A. Two strings of quartz come in within 2 or 3 feet of the crossing.

Q. How wide are these strings?

A. About one-eighth of an inch; about one-sixteenth of an inch; it is a show indicating an existence.

Q. You disagree with Mr. O'Brien with reference to there being solid formation there?

A. I do. I hardly think he is right.

Q. At the point of crossing, as you term it, can you tell which of the vein material belongs to each?

A. Oh, yes, sir.

Q. How?

A. By the appearance of it; by the direction of it. When the Enterprise vein runs through there it carries a certain course right through that Monitor vein; the comb carries its course right straight through it.

291 Q. Has not that comb been made by digging down by the side of it?

A. No. The comb was made by glaciers. It is simply an attempt on the part of the workmen to show anything extraordinary. There has been an honest exposition.

Q. When were you last on the ground?

A. Yesterday afternoon, from half past two to quarter to four.

Q. I will ask you whether, in your judgment, you could not start at the shaft B and run a drift continuously on vein matter from there up substantially through the center of the Monitor into the Monitor discovery shaft.

A. We could drift to China if we were a mind to. I don't know about that; it is possible it may carry slips. It may carry metamorphous porphyry slips. I would not take a contract to do it.

Q. Would you not be of the opinion that you could start at B and drift continuously on vein matter into the Monitor discovery shaft?

A. Well, I could not say I could do that. I don't know whether you could or not, and no human being knows anything about it.

Q. You have no opinion?

A. I think I could not. I would not like to take the contract to do it, because there might be something slipped in there.

Q. You could but for incidental slips in the several veins that would not really interfere with their being the same vein?

A. Why do you want me to answer that? The chances are that it might and might not. It is problematical.

292 Q. You say you could except there might be some pinching out?

A. I don't say I could or could not.

Q. What do you think is the matter of this vein here where the Enterprise crosses, that the Monitor vein does not appear just below the Enterprise; a fault in there?

A. No, sir. I don't know. I think it has been shoved and that would amount to a fault, but I am not positive of that, either. There has been an overflow of igne-us rock in there. I find that rock different from country rock.

Q. What is that rock?

A. Well, sir, the best mineralogists in the world would not tell you without making an analysis. I think it is a species of dolorite such as we find on the great veins all about here.

Q. You think the rock just below is different from what it is a little below here?

A. Yes, sir; there is dolorite on there across it on the right-hand side as you look down the mountain. It is a species of dolorite.

Q. Right over that other side of the Enterprise vein is the same rock?

A. I think that is trachytic; I didn't observe.

Q. What is the surface rock there generally.

A. Trachyte.

Q. Purple porphyry?

A. That is the general term. Trachyte is a little different; trachyte contains fine grains of feldspar.

Q. What causes a fault?

A. Slips sideways.

Q. It is not slipped up or down. If there is a fault there
293 wouldn't you find that the two ends would not come right together?

A. If there is a fault there.

Q. If there was a fault it would not run as it is on that map?

A. No, sir. But why I think the fault is doubtful are the quartz strings coming up within 2 or 3 feet of the junction.

Q. If there is a fault there that vein has never been discovered just below the Enterprise vein, within 25 or 30 feet?

A. If there is a fault there it is thrown that way, probably.

Q. If there is a fault there it has never been found?

A. I don't know. I never have found it.

Q. Do you pretend to say that the stripping that has been done there of the vein running down into the Ule is the same as the Monitor vein?

A. I say it is the same.

Q. Did you find exactly the point of crossing there?

A. Yes, sir. You can see that point, and that is a very beautiful thing to see.

Q. Is it a large vein?

A. No, sir; not very. You will find it begins to swell down here.

It has been disturbed where that crossing was. There was probably a disturbance that the human mind could hardly form any conception of. To bring them in a court of justice seems like blasphemy almost. I feel the littleness of the human mind. The causes you can be mistaken about. You cannot be mistaken about the results, though.

Q. Can you tell where the vein matter of one is distinct from the other?

A. Oh, yes; yes, sir.

Q. Is there a clear point of distinction?

294 A. Yes, sir. When you look with an educated eye upon it you can see it just as plain as I can see that cane.

Q. I will ask you if the quartz and vein matter is not welded into each other and connected.

A. You can see it go right across. As Joe says, it butts there, and there is a clean line of demarcation.

Q. There is a clean-cut track down between them, isn't there?

A. Bless your soul! How you put words in my mouth! I didn't say that.

Q. What do you say as to whether there is a clean-cut crack down between them?

A. I don't say anything about a clean-cut crack. I say the Enterprise holds its way through the Monitor.

Q. Is it not apparent that the vein material of one is welded into the other so that there is not a clean-cut crack down between?

A. No, sir. There is a clean crevice down between them.

Q. On which side of the vein as it runs through?

A. On both sides.

Q. The point is as to whether there is a clean-cut clearage on each side down between them.

A. When the glacier melted it cut these places down.

Q. Does not the vein matter from the Monitor shaft continue right down through here in this direction?

A. No, sir.

Q. Where does it go to?

A. It stops there. It had to stop.

Q. And there is nothing beyond that point in this direc-

295 tion but Enterprise?

A. No, sir.

Q. You have sold out to a new company?

A. Yes, sir.

Q. Formed in England—for a hundred and sixty thousand pounds?

A. I hope we have got money enough to make it go. I have struggled enough and sunk nearly a half million.

Q. Is that a correct map of the mining property on and about the Ulè?

A. Yes, sir; made by some of these crazy surveyors. I don't know whether it is correct or not; I wouldn't verify it. I look upon all that sort of thing as bosh. I don't know anything about that thing.

Q. What is its name?
A. The Crooke's Mining and Smelting Company, Limited.
Q. When did the old company make this sale?
A. Made in the spring.

Objected to and objection sustained. Defendants except.

Q. Are you the Crooke Mining and Smelting Company?
A. I am pretty near and don't get any pay for it, either.
Q. The Annie vein went into that sale, did it not?

Objected to by plaintiff. Objection sustained and defendants except.

Q. Mr. Patterson asked you about how the dip would carry a vein in running through a valley as illustrated in this paper. Suppose you fold this paper and only represent one side of the hill, then the dip would carry it off to the right as you go down the mountain, would it?

A. Say here is a vein; the observer stands vertical. There
296 is no carrying about it; it only seems so.

Q. With vein dipping as it does in the Monitor shaft the vein would apparently be carried off to the right as you go down the mountain?

A. Yes, sir; it dips that way, and there where the ground rises again it carries it to the left.
Q. Have you sunk on this vein you claim to be the Monitor?
A. We have excavated it some.
Q. Is there a shaft sunk on any portion of this vein?
A. No, sir; not that I know of. There is a cut down here of 5 or 6 feet somewhere.

Redirect examination:

Q. You still retain the large proportion of interest in this property?
A. A large proportion of interest in this property I still retain.
Q. And in the sale that you have made, if any part of the property that you have conveyed is not sustained as to the title, you and your original company are the loosers under the writings?
A. Yes, sir.

(By defendants' counsel:)

Q. What is your interest in the company?
A. Over a third of it.

JAMES DUGAN, called for plaintiff, sworn, testified as follows:

Q. Where do you live?
A. Lake City.
Q. How long have you lived in this county?
A. About four years.
Q. State to the jury what your business is.
A. Miner.
Q. How long have you been engaged in mining?

297 A. About seven years in Colorado.

Q. What are you engaged in doing now?

A. Mining, when I can find anything to do.

Q. Have you been over this property?

A. Yes, sir.

Q. Will you state to the jury what your examination shows to you with reference to the vein in dispute?

A. This is the Monitor. The Enterprise, I think, is this vein here.

Q. Will you put your pointer along the course that you believe, as a miner, the Monitor takes?

A. I should say the Monitor took this course down here.

Q. What do you say as to this branch that comes out of the Monitor?

A. I don't know. It may be a spur.

Q. Did you examine the Enterprise carefully?

A. Yes, sir.

Q. How clear are you in your mind that the Enterprise is a separate and distinct vein from either the Monitor or the Annie?

A. There is not any doubt.

Q. I will ask you to state whether or not the vein upon which the Monitor discovery shaft is sunk is this Enterprise vein.

A. No, sir; I think not.

Q. Did you examine the dump of the Monitor?

A. Yes, sir.

Q. What did you find on the dump?

A. Well, it is a kind of a vein matter and iron-stained rock—country rock, a good deal of it.

Q. What do you find as to the quartz?

A. A small quantity.

Q. Stringers of quartz running through it?

A. Yes, sir.

Q. Do you find the vein of the same character down in
298 this direction?

A. I think it would be if it was blasted and thrown up. I am satisfied it crosses and runs through it.

Q. How close up to this junction of the Monitor with the Enterprise did you observe evidence of the vein material?

A. It might be from 20 to 40 feet.

Q. In your judgment, what is the reason you don't see the vein there?

A. It may be that it is capped over and it may be that this vein running through it might cut part of it off and it may be that the mountain has capped it over.

Q. Does the fact that this has cut it and thrown it out make it any less the Monitor vein?

A. I think not.

Q. Did you notice down the Monitor discovery the strike of the Monitor vein as disclosed on the foot wall?

A. Yes, sir.

Q. How does that strike correspond with the course as laid on the map?

A. I did not have anything with me to determine. I should judge from the eye it was about the same.

Cross-examination:

Q. What is the pitch of the Monitor vein as disclosed in the *Monitor vein as disclosed in the* shaft?

A. I could not tell.

Q. Indicate with your ruler about what you judge it to be.

A. It may be that much and it may be a little more.

Q. How much higher is the Monitor shaft here than the ground down at this end?

A. It is considerable.

299 Q. How much would you say?

A. It might be 600 feet; 400 to 600, I should say.

Q. In going down a decline a distance of a thousand feet down the mountain with a fall of 800 feet in that distance where would you expect to see the vein at the bottom? Would it throw it to the right or the left going down that hill?

A. To the right, I think.

Q. Which way does it dip?

A. Into the mountain.

Q. How far to the right do you suppose it would carry it in going down that hill?

A. It would depend a good deal on the slope of the hill.

Q. It would be rather steep, would it not?

A. Yes, sir.

Q. It is steep, is it not?

A. It is. Yes, sir; it is pretty steep.

Q. At this point here where this vein is marked off that line (indicating the line below "*c*" "*d*") what is it, in your opinion, that we have running off here? Are you not in doubt whether that is the Enterprise carries itself off there or down there?

A. I don't think it is the larger portion of the vein; it may be a part of the Monitor.

C. L. HARPIN, called for the plaintiff and sworn, testified as follows:

Q. Where do you live?

A. Lake City and Rose's Cabin.

Q. How long have you lived in this county?

A. Five years this fall.

Q. What is your business?

A. Mining.

Q. How long have you been engaged in mining?

300 A. Eighteen years, since I have been in Colorado.

Q. Are you familiar with Ute hill?

A. I have been there three or four times.

Q. Have you made careful examination of that part of the Ute

hill upon which the Annie, Monitor, and Enterprise lodes are located?

A. I have.

Q. Have you arrived at a conclusion that is satisfactory to yourself as a miner which they are?

A. Yes, sir.

Q. Will you point out on the map the vein or lode upon which the Monitor discovery shaft is sunk?

A. There is the discovery of the Monitor and there is the course of it down the hill.

Q. And how up the hill?

A. From B to this point here.

Q. As a miner have you any doubt of that?

A. None whatever.

Q. The Annie runs where?

A. There is the Annie here.

Q. Have you any doubt of that fact?

A. No, sir.

Q. What does this cross-fissure coming across both of them?

A. That is the Enterprise.

Q. State whether the Enterprise is a separate and distinct vein from the Monitor.

A. Yes, sir; all the connection she's got is right here at the junction.

Q. Which do you think was the latest fissure formed?

A. The Enterprise.

Q. You heard Mr. Crooke speak about the Cone; state what you know about that.

A. I was not here when Mr. Crooke was testifying, but you take the vein from here it is all crevice matter. The crevice is
301 higher than the boundaries on the sides of it.

Q. Does that condition continue into the shaft?

A. Yes, sir; clear up to the wagon road.

Q. Is there room for mistake in this being a cross-vein?

A. No, sir.

Q. You went along these various openings?

A. Yes, sir.

Q. And you satisfied yourself from that examination?

A. Yes, sir.

Cross-examination:

Q. How long did you say you had mined?

A. I have been in mining and milling for 18 years.

Q. How much have you prospected during that time?

A. Oh, every once in awhile.

Q. What is the dip of the vein as disclosed in the Monitor shaft?

A. Where the shaft is sunk she is right straight down. I went down as far as the water. I should judge she would go just about that way.

Q. How high is the Monitor shaft above the Lake City and Uncompahgre toll road or the end of the claims?

A. I didn't measure this time; I measured last spring. It is between 600 and 700 feet from the Ulè.

Q. What is the difference in height?

A. I don't know. It would be probably four or five hundred feet. I did not pay much attention to it.

Q. Going up the mountain you find it rather steep?

A. Yes, sir.

Q. With the dip as disclosed in the Monitor shaft how would that carry the vein going down the hill?

302 A. That is where it would carry it, right here.

Q. That is your theory?

A. That is my knowledge; that is my belief.

Q. You say that the dip would carry it to the left. You do not agree with Mr. Dugan?

A. I heard his te-timony.

Q. You do not agree with him that the dip would carry it to the right, starting from the Monitor discovery shaft and going down the hill with the dip that is disclosed in the shaft. Would that dip carry it to the right or the left?

A. The dip would carry it the way it pitches.

Q. Which way does it dip?

A. Into the mountain.

Q. The vein as disclosed in the Monitor shaft does not pitch out of the mountain toward the line "*b*" "*c*" "*d*," but in the mountain off toward the Uté.

A. I think it might throw it a little down the hill on account of the gulch.

Q. Which way does it pitch?

A. North.

Q. Look upon that map—indicate where the Monitor vein pitches as disclosed in the shaft.

A. This way.

Q. Starting with a pitch in that direction and being 500 feet higher here than it is down here in going down this hill, would that vein be carried off here to the right or to the left?

A. I don't think it would change her course.

Q. You say you have gone down this ditch here?

A. Yes, sir.

Q. What do you find in here?

303 A. Right in here some vein matter, quartz, and porphyry mixed up together.

Q. You testified last term?

A. Yes, sir.

Q. Didn't you testify there was a well-defined vein running off here?

A. There is a pretty well-defined vein.

Q. What vein is that?

A. I don't know; it always looked to me like a feeder. The way it looks to me this vein here is the last one and she crosses the Monitor right across.

Q. At the point of crossing is not the quartz welded together indiscriminately?

A. It is welded together from these veins.

Q. There is quartz comes down here from the Monitor, is there not?

A. Yes, sir.

Q. At that point of crossing isn't the quartz indiscriminately welded together?

A. Right at the point of crossing you will find the Enterprise quartz.

Q. You could not say which is Enterprise and which is Monitor, could you? Does the Monitor jut up against the Enterprise in that way?

A. No; the Enterprise runs across the Monitor.

Q. Is there any seam down between them that makes a line of demarcation between the Enterprise and Monitor?

A. You take the quartz right at the junction — you will find the Enterprise quartz.

Q. At the point of crossing is there a plain line of demarcation between the Enterprise and Monitor?

A. There is a plain line.

304 Q. There is a crack down between them, is there?

A. There is a plain line or crack.

Q. How close up did you trace up and find quartz?

A. You will find quartz all along there.

Q. How near was the nearest point to the point of intersection?

A. You find a little right there, close to the junction, what I should call vein matter.

Q. Did you find quartz 40 or 50 feet down there?

A. You take it right there at the junction and you find a seam there.

Q. Why does not the Monitor appear right on the other side of the point of intersection, as she does here?

A. I think she is capped over right there.

Q. Do you have any facts on which to base that theory?

A. Because we have seen the facts before on some other mine. The fact is this: If the vein is right here—and we find her right there—she must be capped if she don't show on the surface.

Q. Does it not make that curve there in unbroken line?

A. The Monitor is broken; yes, sir.

Q. You say there is a crack down between them?

A. Yes, sir.

Q. When you testified last term was there not a tree standing here at that time?

A. There was a tree above.

Q. Did you not state that the crossing of the two veins was above the tree?

A. It might be above; I cannot say now. It was near the tree.

Q. The roots of a tree are still there?

305 A. Yes, sir; but the tree was a little above.

Q. Did you not testify at the last term of this court that

above the tree you saw the indications of the Enterprise cutting across the Monitor, and that you saw then the Monitor on this side?

A. Yes, sir; we can see the Monitor right down here below the tree.

Q. Since that tree is cut out and this trench dug up to the Enterprise you have changed your opinion and now you say the crossing is lower down?

A. I don't remember about that exactly.

Q. Did you not testify distinctly that the crossing of the Enterprise vein with the Monitor was above that tree, and that Monitor quartz showed very clearly below that point of crossing so that you could see the Monitor quartz on both sides?

A. I always claimed at the last term that the Enterprise was the last crossing.

Q. Why do you think so?

A. Because she carries her force clear through and the Monitor is broken on both sides of the Enterprise.

Q. Why does that indicate to you that it is a newer vein?

A. Because she carries her force clear through; that is my knowledge of it; that is my belief.

Q. You see that point B down on the Annie; do you think that you can drift from that point continuously on vein matter into the Monitor shaft?

A. No, sir.

Q. Why not?

A. Because it is not the same direction.

Q. Isn't there a connected course of vein matter?

306 A. There are two separate veins. I might by running a cross cut to it.

Q. On vein matter from B up to the Monitor shaft could you run on continuous vein matter?

A. If you start from B and run to the Enterprise you will be on quartz matter, and right here quartz also.

Redirect examination:

Q. You say that what you have testified is your knowledge or belief.

A. Yes, sir.

Q. Is your belief based upon the facts you have been describing?

A. Yes, sir.

Q. Can't you go from point D and reach the Ulè vein and drift all the way on vein matter?

A. Yes, sir.

Q. That does not make the Ulè vein the Annie vein?

A. No, sir; it is just like two roads.

JAMES W. ABBOTT, recalled for plaintiff, testified as follows:

Q. You have already stated your business and experience?

A. Yes, sir.

Q. Will you state to the jury whether or not you made this map?

A. I stated with reference to that.

Q. I will ask you to state if you placed this Monitor vein upon the map—this cross-vein upon the map—the Annie, the Ulè, and the Ute and this vein?

A. There is no vein that was not placed under my immediate supervision. They are placed there by actual measurements and actual data as carefully as we ever undertake to represent
307 in any map. That was done with observation by transit. We do not do this with the same kind of accuracy we do lots in town.

Q. Did you hear Mr. Mullin testify about certain mounds of rock put up on the bluff near which the vein passes?

A. I heard him testify something to that effect.

Q. Do you recollect such a mound of stones along the line of that vein?

A. I recollect a mound of stone I have seen ever since I first commenced to walk over the Monitor vein, either in 1877 or 1878. That was, as near as I can recollect, at C.

Q. Did you know what that indicated?

A. I always supposed it was placed there by a prospector as a guide to him in staking his vein; that somebody who located on that vein placed it there. I never knew until yesterday how it came there.

Q. How late was it there?

A. I saw it this spring. I believe it was when we were there at the time of the last suit.

Q. Got removed in the working?

A. I don't know how it got removed.

Q. Have you satisfied yourself as to which is the Monitor, which is the Annie, and which is the Enterprise on Ute hill?

A. I testified before that this is on the extension of the Ute. I have been perfectly satisfied since I begun to look into the matter that this was the Monitor running from the Ulè lode up to the Monitor shaft. I am satisfied now from recent developments
308 that this is the vein called the Enterprise vein, running through the Enterprise shaft and down through the Annie.

Q. How distinctly is the Enterprise vein or fissure disclosed?

A. It is disclosed from the upper side of this bench continuously for over 300 feet in length. A person can get into such a position that the eye will run along that without the break of a foot. In that distance it crosses the Monitor; then there is a break here in which there are no pits. This is a continuous trench, in which you can walk all the way from here to here.

Q. What has been disclosed at this point and running out there?

A. A seam running in the same direction, filled with vein matter.

Q. What do you say as to that being a continuation of the vein that is there disclosed?

A. We find a vein there without any question in the end of the

trench; we find it here in the end of "*o*;" we find it here running in the same direction. I conclude it is the same vein. I have not any doubt of it.

Q. Have you examined the dip of the Monitor as disclosed in the discovery shaft?

A. I have a little.

Q. In examining the dip, did you notice the strike of that fissure by the foot wall as seen in the shaft?

A. I noticed it by the strike of the vein as shown above the shaft and below. I don't care anything about the strike as seen on the foot wall in the shaft.

Q. The question has been asked about the way the dip
309 would take it.

A. That is the verriest humbug in the world. The dip of a vein don't make any difference in its course on a hill as long as the declivity is regular, whatever may be the slope of the hill; the slope of the hill being regular, the dip of a vein does not have anything to do with its course. We will assume that this book represents the side of a hill which is regular in its course. There is a rule which stands verti*cle*, that will represent a vein without any dip at all. I can turn that rule so to represent a vein with a very great dip, and it follows precisely the same line.

Q. Take the side of a mountain, say two thousand feet long, that has a regular declivity and you find a vein disclosed on the surface, it being regular, you have a perfectly straight line?

A. Yes, sir.

Q. What will make any local irregularities in that line?

A. Anything which tends to change the declivity of the hill or cut it out. (Witness illustrates with books.)

Q. Wherever you get the original surface of the hill you always find that line resuming its original course?

A. Provided the vein maintains the same strike.

Q. With reference to this hill, has not the bluff got a comparatively regular ascent for a considerable distance above the Monitor discovery?

A. It is my recollection that the slope of the hill is quite uniform, with local irregularities.

310 Q. Then local irregularities produce these seeming bends or curves?

A. They would do that provided the strike of the vein was perfectly straight; but you must recollect that all seams are not absolutely straight; they have their own sinuosities.

Q. How is it about a vein maintaining the same general course?

A. That is the rule. The general course is quite straight, with local sinuosities.

Cross-examination:

Q. As to that pile of rock that you noticed near C, you think you first saw it in 1877 or 1878?

A. Yes, sir.

Q. Was there a small crooked stick in it then?

A. No, sir; there could not be a crooked stick in it. It was not a mound; it was one stone set upon another.

Q. That was the one nearest to the cliff?

A. It was the one that the eye most readily caught looking from the Monitor discovery shaft down.

Q. And was there not another one with a crooked stick in it up a little distance from it?

A. Not that attracted my attention. The one that always attracted my attention when I went to the Monitor shaft was near C.

Q. There was not one that attracted your attention with a crooked stick in it?

A. No, sir. I think that probably the pile you refer to was a little further down and was hidden by a bluff of rocks coming up there. There were a good many in that vicinity.

Q. Is this map drawn from your surveys?

A. No, sir.

Q. Or from surveys or descriptions furnished by you?

A. I never furnished anything with reference to it; made
311 by some of those crazy surveyors Mr. Crooke was testifying about this morning, I suppose.

Q. Will you look at that and see if it is a representation of these lodes?

A. I have no means of testing that, and the only way I could do it would be to make a map on the same scale as this and make a tracing from it and put it on top of it and see if they agreed.

Q. What is your best judgment as you look at it?

A. Apparently the Ute and Ulè seem to be in proper relative position. The Annie seems to come up and butt against the Ute there, so that as a matter of fact that cannot be right anyhow. The Enterprise corner seems to be about as it appears on this map.

Q. Are there such lodes on the mountain and in the neighborhood of the Ute and Ulè as are represented on that map? Look over it.

A. I have surveyed every lode represented on that map. It may be that this Annie named there has reference to the lode the outside lines of which are here. That Annie is not right in there.

Q. Are these locations then substantially about as you recollect their positions to be?

A. That I do not say.

The defendants then offered the second page of said map in evidence for the purpose of showing the names of the lodes which the witness had testified to as having been all surveyed by him upon the mountain.

Objected to by plaintiff, and objection sustained. Defendants except.

312 Q. You said that the dip of a lode in running down the regular slope of a mountain would not make its course irregular.

A. I testified to that, that it does make a difference.

Q. Would it not appear at a place where it *go?*

A. Provided the strike and dip were regular, there being an irregularity on the hill, there would be a curve in the vein as shown on the surface.

Q. Have you ever been down in the shaft?

A. No, sir. I said I didn't care anything about the walls in a shaft to determine the strike. You can't tell within 45 degrees what the general strike of the vein is; that is sunk at hap hazard. The shaft is the proper place to find the dip.

Q. Is it not a fact that it frequently happens that veins at or near the surface will not take the regular dip of the vein?

A. The rule is that the nearer the surface the greater the dip.

Q. Where the surface is shaken up?

A. I never have seen any exceptions.

Q. Is it not true that you have to go down into the ground some distance before you can determine properly the dip of the vein?

A. Before you can determine it often.

Q. What is the dip of the Ute vein?

A. About 15, 16, or 17 degrees from the vertical. The first part of the shaft has more than the other.

Q. What is the dip of the Ulè?

A. The dip of the Ulè is very regular; the dip is about 20
313 degrees from a vertical.

Q. You thought the Enterprise crossed the Monitor at this point?

A. I do.

Q. How much, if any, of a vein is disclosed immediately below the crossing of that Enterprise vein on what you term the Monitor?

A. I feel more positive about that than any of the other witnesses, and that is that there are signs to be found below this Enterprise shaft that are unmistakable; you don't go down there three feet before you find unmistakable evidences of the vein.

Q. I asked you about finding a vein.

A. Within 3 or 4 feet you find seams of quartz running in.

Q. Which way do they run?

A. The same way that the walls of the Monitor run above the intersection, as near as I can judge.

Q. You don't agree with witnesses that there are little seams that seem to run parallel with the Enterprise?

A. No, sir.

Q. And you think there is no slide-rock there that caps it over, or no fault?

A. I have not seen any signs of any fault myself.

Q. How wide are these little streaks of quartz?

A. I saw what appeared to one to be the rocks that constitute the walls of this vein running down there within 3 or 4 feet below the crossing; to be sure, the material with which that vein is filled is different from the material with which that vein is filled below,
314 but I agree with Mr. Crooke that it is a metamorphosed ign-eus-

rock that is filled in there; the sign of the vein is these cracks and these walls.

Q. How many cracks do you see there?

A. The most significant to my mind are those that seem to be a continuation of those walls.

Q. Have you had any practical experience as a miner?

A. I never thumped a drill, I never wheeled a wheel-barrow, and never held the drill; I have had charge of considerable mining since I have been here.

Q. What mining work have you had charge of?

A. Mr. Estep has done a good deal of mining under my supervision on the Dolly Varden hill.

Q. Is that the extent of your supervision?

A. No, sir; we have been called to consult as to how mining work should be done, how veins should be opened up in a good many cases. I have had supervision directly of a good deal of what you call assessment work, a great many assessment-works; I had charge of a good deal of work on the Bell- of the West at one time; I had charge of all Mr. Mangham's work one winter when he was working a half a dozen different mines. He must have expended fifteen thousand dollars that winter under my supervision.

Q. How long did you say you had been in this country?

A. Since 1875; another time I recollect since then, when Mr. Mangham was away and was in doubt what to do he would write me and have me look into it.

315 Q. Do you remember seeing the Rachel shaft about the time it was sunk?

A. Yes, sir; I surveyed the Rachel very shortly after it was located and knew about their getting mineral out of there. Joe Simonds said it was the extension of the Ute and I used to laugh at him.

Q. Do you remember the shaft at B?

A. Yes, sir.

Q. Average dump mineral here, was there not?

A. I don't remember.

Q. And here?

A. I know there is mineral there. You can go and find it, no doubt.

Q. You found mineral on this vein here above the Monitor discovery shaft?

A. Yes, sir.

Q. What mineral?

A. The principal mineral that you find up there is iron.

Q. Found galena there, too?

A. A trifle, but not very much.

Q. What is your opinion as to whether or not you could commence here at shaft B on the Annie vein and run a continuous drift upon vein matter up into the Monitor discovery shaft?

A. I testified last term of court that I believed you could, and I believe so still.

Q. What is the altitude of the discovery shaft above shaft B?

A. I was thinking about that when Mr. Harpin was testifying about it and I thought his testimony was very intelligent about it. I would say four or five hundred feet.

Q. And take it above the Monitor discovery shaft up in this direction, towards the southeast corner of the Ute mine, what
316 is the slope of the mountain there?

A. The average slope, I should think, was not far from 23 or 24 degrees. I always have to take the slope of the mountain and I take it a great many times in a single survey, and my judgment would be that the average rise all the way up here is in the neighborhood of 24 degrees.

The plaintiff then offered in evidence the map that had been used throughout the trial, and the same was admitted in evidence and marked Exhibit "H."

Plaintiffs rest.

A. R. BUSHNELL, being recalled for defendants, testified as follows:

Q. State what you know about the mound of rocks that has been referred to.

A. In 1877, when I was out here, I examined the slope of the mountain and contemplated running a tunnel in from over the cliff to cut the Monitor vein from that side, and looking over the ground I determined on a point from which I thought it advisable to start the tunnel and I put two piles of rock there; one was at the right hand and one was at the left, a little distance apart, perhaps 20 feet apart. In one of them I put in a stick and piled rocks about it and the other one I piled rocks. I am not certain which one I put the stick in.

Q. Have you seen those mounds since?

A. I think that I saw them last year, or one or more of them. I could not say positively; that is my impression. I never
317 thought a thing about it until I heard the testimony, but I remember distinctly placing some rock piles there with that view.

Defendants rest.

Which was all of the testimony in the case.

PLAINTIFF'S EXHIBITS.

318 *Location Certificate.*

STATE OF COLORADO, } ss:
County of Hinsdale, }

Know all men by these presents that I, the undersigned, have this the twelfth day of October, A. D. 1878, claimed, by right of relocation, as abandoned property fifteen hundred feet linear and horizontal measurement in length and three hundred feet in width on

the "Annie" lode along the vein thereof, with all its spurs, dips, variations, and angles, together with the amount of surface necessary for working the same and allowed by law, one hundred and fifty feet of said lode being southwesterly of said discovery shaft on said lode and thirteen hundred and fifty feet being northeasterly of said discovery shaft, said lode being situated in Galena mining district, in the said county of Hinsdale and State of Colorado, the location and bounds of said claim being marked and described more particularly as follows, to wit: Beginning at the southeast corner of said claim, at a post marked No. 1, and running thence (1) N. 34° 20′ E. 750 feet, center post, 1,500 feet northeast corner No. 2; N. 55° 40′ west 300 feet, N. W. Co. 3; S. 34° 20′ W. 750′ W., center post, 1,500 feet southwest corner No. 4; S. 55° 40′ E. 300 feet, southeast corner, place of beginning. From corner No. 2 cor. No. 11 of survey 148, Ute lode, bears N. 14° 30′ W. 109 feet; also from cor. No. 2 a stump 15″ bears S. 48° E. 10 feet; the said lode being formerly known as the "Rachel," the original location certificate thereof being recorded in Lode Record No. 1, page 400, of the records of said Hinsdale county, in the said State.

JOHN DOHERTY.

319 STATE OF COLORADO, } *ss:*
County of Hinsdale, }

I, Thomas Sharly, county clerk and recorder in and for said county, in the State aforesaid, do hereby certify the aforegoing to be a correct copy of the location certificate of the Annie lode, Book 2, page 619, as the same appears indexed of record in the books of my office.

Given under my hand and official seal this eighth day of August, 1882.

THOMAS SHARLY,
County Clerk and Recorder.

Endorsed as follows:

No. 6619. Location certificate, Annie lode. State of Colorado, county of Hinsdale, *ss:* Filed for record this 18th day of November, 1878, at 11.3 o'clock a. m. Recorded in Book 2, page 619. O. D. Downtain, recorder.

106. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Defendants' Exhibit 1. Filed Aug. 12, '82. E. D. Bouton, clerk.

320 STATE OF NEW YORK, } *ss:*
City and County of New York, }

We, the undersigned, John N. Goodwin, Lewis Crooke, Elihu J. Granger, Thomas T. Mason, William Hart Smith, William Spence, all of the said city of New York, and Samuel W. Hill, of Marshall, in the county of Calhoun and State of Michigan, do hereby certify that we desire to form a company pursuant to the provisions of an act entitled "An act to authorize the formation of corporations for

manufacturing, mining, mechanical, or chemical purposes," passed February 17, 1848, and of the several acts extending and amending said act.

First. That the corporate name of this company is "The Crooke Mining and Smelting Company."

Second. The objects for which said company is formed are as follows: The mining, milling, smelting, reducing, and refining ores of silver and other mineral ores found in connection therewith upon the property of said company and the doing all things incidental thereto or necessarily connected therewith.

Third. That the capital stock of said company shall be twelve hundred thousand dollars divided — one hundred and twenty thousand shares of ten dollars each.

Fourth. That the term of existence of said company is to be fifty years.

Fifth. That the number of trustees who shall manage the concerns of said company shall be seven, and the names of such
321 trustees for the first year are John N. Goodwin, Lewis Crooke, Elihu J. Granger, Thomas F. Mason, William Hart Smith, William Spence, all of the city of New York, and Samuel W. Hill, of Marshall, in the county of Calhoun and State of Michigan.

Sixth. The said company is formed for the purpose of carrying on some part of its business out of the State of New York, namely, at Lake City and at other points in the counties of Hinsdale, San Juan, and Rio Grande, in the State of Colorado; and the name of the town and county in which the principal part of the business of said company is to be transacted within this State is the city of New York, in the county of New York.

Dated New York, September 16, 1878.

Executed in triplicate.

JOHN N. GOODWIN. [SEAL.]
LEWIS CROOKE. [SEAL.]
E. J. GRANGER. [SEAL.]
THOS. F. MASON. [SEAL.]
WM. HART SMITH. [SEAL.]
WM. SPENCE. [SEAL.]
SAM. W. HILL. [SEAL.]

CITY AND COUNTY OF NEW YORK, *ss:*

On this 16th day of September, 1878, before me personally appeared John N. Goodwin, Thomas F. Mason, and William Hart Smith, and on the 17th day of September, 1878, before me personally appeared Lewis Crooke, Samuel W. Hill, and Elihu J. Granger, and on this 18th day of September, 1878, before me personally appeared William Spence, all and severally to me personally known and known to me to be the individuals described in and who executed the foregoing certificate, and they severally before me signed the said certificate and acknowledged that they signed the
322 same for the purposes therein set forth.

[NOTARIAL SEAL.] C. G. KIDDER,
Notary Public (90), *New York County.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Henry A. Gumbleton, clerk of the said city and county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original certificate of incorporation on file in my office, and that the same is a correct transcript therefrom and of the whole of such original.

Endorsed: Filed 18 September, 1878.

Official Seal. In witness whereof I have hereunto subscribed my name and affixed my official seal this 18th day of September, 1878.

HENRY A. GUMBLETON, *Clerk.*

STATE OF NEW YORK, }
Office of the Secretary of State, } *ss:*

I have compared the preceding with the original certificate of incorporation of the Crooke Mining and Smelting Company, with acknowledgement thereto annexed, filed in this office on the
323 19th day of September, 1878, and do hereby certify the same to be a correct transcript therefrom and of the whole of the said original.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, this nineteenth day of September, one thousand eight hundred and seventy-eight.

[OFFICIAL SEAL.]

GEO. MOSS,
Deputy Secretary of State.

STATE OF COLORADO, }
Secretary's Office, } *ss:*

I, Norman H. Meldrum, secretary of state of the State of Colorado, do hereby certify that the foregoing is a full, true, and complete transcript of the certified copy of the certificate of incorporation of the Crooke Mining and Smelting Company, which was filed in this office the twenty-eighth day of September, A. D. 1878, at nine o'clock a. m., and admitted to record.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State, at the city of Denver, this twenty-second day of July, A. D. 1881.

[OFFICIAL SEAL.]

N. H. MELDRUM,
Secretary of State.

Endorsed as follows:

97. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Plaintiff's Exhibit A. Filed Aug. 12, '82. E. D. Bouton, clerk.

324 STATE OF NEW YORK, }
County and City of New York, } *ss:*

Know all men by these presents that I, John N. Goodwin, as president, and William H. Smith, as secretary, of the Crooke Mining and

Smelting Company, a corporation duly organized under and by virtue of the laws of the State of New York and doing business in the State of Colorado, do hereby certify that the principal place where the business of said company will be carried on in the State of Colorado shall be at Lake City, in the county of Hinsdale, and that John J. Crooke is the authorized agent of said company, residing at Lake City, in the said county of Hinsdale, upon whom any legal process may be served.

In witness whereof the said John N. Goodwin, as president of said company, and William H. Smith, as secretary thereof, have hereunto set their hands and seals this the 6th day of November, A. D. 1878.

JOHN N. GOODWIN, [SEAL.]
President.

[CORPORATE SEAL.] WILLIAM HART SMITH, [SEAL.]
Secretary.

STATE OF COLORADO, } *ss:*
Secretary's Office, }

I, Norman H. Meldrum, secretary of state of the State of Colorado, do hereby certify that the foregoing is a full, true, and complete transcript of the certificate of the principal place of business and authorized agent in the State of Colorado of the Crooke Mining and Smelting Company, which was filed in this office the
325 eighteenth day of November, A. D. 1878, at nine o'clock a. m., and admitted to record.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State, at the city of Denver, this 25th day of July, A. D. 1881.

[OFFICIAL SEAL.] N. H. MELDRUM,
Secretary of State.

Endorsed as follows:

98. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Plaintiff's Exhibit B. Filed Aug. 12, '82. E. D. Bouton, clerk.

326 No. 6607. Certificate of the Crooke Mining and Smelting Company. Filed for record Nov. 14th, 1878, at 1.35 o'clock p. m. O. D. Downtain, recorder.

STATE OF NEW YORK, } *ss:*
City and County of New York, }

Know all men by these presents that I, John N. Goodwin, as president, and William H. Smith, as secretary, of the Crooke Mining and Smelting Company, a corporation duly organized under and by virtue of the laws of the State of New York and doing business in the State of Colorado, do hereby certify that the principal place where the business of said company shall be carried on in the State of Colorado shall be at Lake City, in the said county of Hinsdale, and that John J. Crooke is the authorized agent of said company,

residing at Lake City, in the said county of Hinsdale, upon whom any legal process may be served.

In witness whereof the said John N. Goodwin, as president of said company, and William H. Smith, as secretary thereof, have hereunto set their hands and seals this the 6th day of November, A. D. 1878.

[CORPORATE SEAL.] JOHN N. GOODWIN, [SEAL.]
President.
W. HART SMITH, [SEAL.]
Secretary.

STATE OF COLORADO, }
County of Hinsdale, } *ss:*

I, Thomas Sharly, county clerk and recorder in and for
327 said county, in the State aforesaid, do hereby certify the foregoing to be a correct copy of the certificate No. 6607 in the series of my Office Book 5, page 351, as the same appears indexed of record in the books of my office.

Given under my hand and official seal this thirteenth day of April, 1882.

[OFFICIAL SEAL.] THOMAS SHARLY,
County Clerk and Recorder.

Endorsed as follows:

99. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Plaintiff's Exhibit C. Filed Aug. 12, '82. E. D. Bouton, clerk.

328 United States of America, by Lucius Robinson, governor of the State of New York:

It is hereby certified that George Moss was, on the day of the date of the annexed certificate, deputy secretary of state of the State of New York and duly authorized to grant the same; that the same is in due form and executed by the proper officer; that the seal affixed to said certificate is the seal of the secretary of the State of New York; that the signature thereto of the said deputy secretary of state is in his own proper handwriting and is genuine, and that full faith and credit may and ought to be given to his official acts.

[SEAL.] In testimony whereof the great seal of the State is hereunto affixed.

Witness my hand, at the city of Albany, the 30th day of November, in the year of our Lord one thousand eight hundred and seventy-eight.

Passed the secretary's office the 30th day of November, 1878.

L. ROBINSON.

ALLEN C. BEACH,
Secretary of State.

CHAPTER 40.

An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes, passed Feb'y 17th, 1848.

The people of the State of New York represented in senate
329 and assembly, do enact as follows:

SEC. 1. At any time hereafter, any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business, may make, sign and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of the said company, and the objects for which the company shall be formed, the amount of the capital stock of the said company, the term of its existence not to exceed fifty years the number of shares of which the said stock shall consist, the number of trustees and their names, who shall manage the concerns of said company for the first year, and the names of the town and county in which the operations of said company are to be carried on.

SEC. 2. When the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowledged the same, and their successors shall be a body politic and corporate, in fact and in *main*, by the name stated in such certificate: and by that name have succession, and shall be capable of suing and being sued in any court of law or equity in this State, and they and their successors may have a common seal, and may make and alter the same at pleasure: and they shall, by their corporate name be capable in
law of purchasing, holding and conveying any real and per-
330 sonal estate whatever, which may be necessary to enable the said company to carry on their operations named in such certificate, but shall not mortgage the same or give any liens thereon.

SEC. 3. The stock, property and concerns of such company shall be managed by not less than three nor more than nine trustees, who shall respectively be stockholders in such company and citizens of the United States, and the majority of whom shall be citizens of this State, who shall, except the first year be annually elected by the stockholders at such time and place as shall be directed by the by-laws of the company: and public notice of the time and place of holding such election shall be published not less than ten days previous thereto, in the newspaper printed nearest to the place where the operation of the said company shall be carried on; and the election shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy. All elections shall be by ballot, and each stockholder shall be entitled to as many votes as he owns shares of stock in the said company, and the persons re-

ceiving the greatest number of votes shall be trustees; and when any vacancy shall happen among the trustees, by death, resignation or otherwise, it shall be filled for the remainder of the year in such manner as may be provided for by the by-laws of the said company.

SEC. 4. In case it shall happen at any time that an election of trustees shall not be made on the day designated by the by-
331 laws of such company, when it ought to have been made, the company for that reason shall not be dissolved, but it shall be lawful on any other day to hold an election for trustees, in such manner as shall be provided for by the said by-laws, and all acts of trustees shall be valid and binding as against such company, until their successors shall be elected.

SEC. 5. There shall be a president of the company, who shall be designated from the number of trustees, and also such subordinate officers as the company by its by-laws may designate, who may be elected or appointed, and required to give such security for the faithful performance of the duties of their office as the company by its by-laws may require.

SEC. 6. It shall be lawful for the trustees to call in and demand from the stockholders respectively, all such sums of money by them subscribed, at such times, and in such payments or installments as the trustees shall deem proper, under the penalty of forfeiting the shares of stock subscribed for, and all previous payments made thereon, if payment shall not be made by the stockholders within sixty days after a personal demand or notice requiring such payment shall have been published for six successive weeks in the newspaper nearest to the place where the business of the company shall be carried on as aforesaid.

SEC. 7. The trustees of such company shall have power to make such prudential by-laws as they shall deem proper for the management and disposition of the stock and business affairs of such company, not inconsistent with the laws of this State, and pre-
332 scribing the duties of officers, artificers, and servants that may be employed, for the appointment of all officers, and for carrying on all kinds of business within the objects and purposes of said company.

SEC. 8. The stock of such company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no shares shall be transferable until all previous calls thereon shall have been fully paid in, or shall have been declared forfeited for the non-payment of calls thereon; and it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation.

SEC. 9. The copy of any certificate of incorporation, filed in pursuance of this act, certified by the county clerk or his deputy, to be a true copy, and of the whole of such certificate shall be received in all courts and places, as presumptive legal evidence of the facts therein stated.

SEC. 10. All the stockholders of any company incorporated under this act, shall be severally individually liable to the creditors of the

company in which they are stockholders, to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section; and the capital stock so fixed and limited shall al- be paid in, one-half thereof within one year
333 and the other half thereof within two years from the incorporation of said company, or such corporation shall be dissolved.

SEC. 11. The president and the majority of trustees, within 30 days after the payment of the last installment of the capital stock, so fixed and limited by the company, shall make a certificate stating the amount of the capital so fixed and paid in; which certificate shall be signed and sworn to by the president and a majority of the trustees; and they shall, within the said thirty days record the same in the office of the county clerk of the county wherein the business of the said company is carried on.

SEC. 12. Every such company shall annually, within twenty days from the first day of January, make a report which shall be published in some newspaper, published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees; and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on; and if any of said companies shall fail to do so, all the trustees of the company shall be jointly and severally liable for all the debts of the company, then existing, and for all that shall be contracted before such report shall be made.

334 SEC. 13. If the trustees of any such company shall declare and pay any dividend when the company is insolvent, or any dividend, the payment of which would render it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally liable for all the debts of the company then existing and for all that shall be thereafter contracted, while they shall respectively continue in office: Provided, That if any of the trustees shall object to the declaring of the dividend or to the payment of the same, and shall at any time before the time fixed for the payment thereof file a certificate of their objection in writing with the clerk of the company and with the clerk of the county, they shall be exempt from the said liability.

SEC. 14. Nothing but money shall be considered as payment of any part of the capital stock, and no loan of money shall be made by any such company to any stockholder therein; and if any such loan shall be made to a stockholder, the officers who shall make it, or who shall assent thereto, shall be jointly and severally liable to

the extent of such loan and interest, for all the debts of the company contracted before the repayment of the sum so loaned.

SEC. 15. If any certificate or report made, or public notice given, by the officers of any such company, in pursuance of the provisions of this act, shall be false in any material representation all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof.

335 SEC. 16. No person holding stock in any such company, as executor, administrator, guardian or trustee and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company; but the person pledging such stock shall be considered as holding the same and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian or trustee, shall be liable in like manner, and to the same extent as the testator or the intestate, or the ward or person interested in such trust fund would have been, if he had been living and competent to act, and held the same stock in his own name.

SEC. 17. Every such executor, administrator, guardian or trustee, shall represent the share of stock in his hands at all meetings of the company, and may vote accordingly as a stockholder; and every person who shall pledge his stock as aforesaid, may, nevertheless, represent the same at all such meetings, and may vote accordingly as a stockholder.

SEC. 18. The stockholders of any company organized under the provisions of this act, shall be jointly and severally individually liable for all debts that may be due and owing to all their laborers, servants and apprentices, for services performed for such corporations.

SEC. 19. The legislature may at any time alter, amend or repeal this act or may annul or repeal any incorporation formed or created under this act; but such amendment or repeal shall not, nor shall the dissolution of any such company take away or impair

336 any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.

SEC. 20. Any corporation or company heretofore formed, either by special act or under the general law, and now existing for any manufacturing, mining, mechanical or chemical purposes, or any company which may be formed under this act, may increase or diminish its capital stock by complying with the provisions of this act, to any amount which may be deemed sufficient and proper for the purposes of the corporation, and may also extend its business to any other manufacturing, mining, mechanical or chemical business subject to the provisions and liabilities of this act. But before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the amount of capital to which it is proposed to be reduced such amount of debts and liabilities shall be satisfied and reduced so as not to exceed such diminished amount of capital; and any existing com-

pany, heretofore formed under the general law, or any special act, may come under and avail itself of the privileges and provisions of this act, by complying with the following provisions and thereupon such company, its officers and stockholders, shall be subject to all the restrictions, duties and liabilities of this act.

SEC. 21. Whenever any company shall desire to call a meeting of the stockholders for the purpose of availing itself of the privileges and provisions of this act, or for increasing or diminishing
337 the amount of its capital stock, or for extending or changing its business, it shall be the duty of the trustees to publish a notice signed by at least a majority of them, in the newspaper of the county, if any shall be published therein, at least three successive weeks, and to deposit a written or printed copy thereof in the post office addressed to each stockholder at his usual place of residence, at least three weeks previous to the day fixed upon for holding such meeting; specifying the object of the meeting, the time and place, when and where such meeting shall be held, and the amount to which it shall be proposed to increase or diminish the capital, and the business to which the company would be extended or changed, and a vote of at least two-thirds of all the shares of the stock shall be necessary to an increase or diminution of the amount of its capital stock, or the extension or change of its business as aforesaid, or to enable a company to avail itself of the provisions of this act.

SEC. 22. If at any time and place specified in the notice provided for in the preceding section of this act, stockholders shall appear in person or by proxy, in number representing not less than two-thirds of all the shares of the stock of the corporation, they shall organize by choosing one of the trustees chairman of the meeting, and also a suitable person for secretary, and proceed to a vote of those present, in person or by proxy, and if on canvassing the votes, it shall appear that a sufficient number of votes has been given in favor of increasing or diminishing the amount of capital, or of extending or
338 changing its business, as aforesaid, or for availing itself of the privileges and provisions of this act, a certificate of the proceedings, showing a compliance with the provisions of this act, the amount of capital actually paid in, the business to which it is extended or changed, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be increased or diminished, shall be made out, signed and verified by the affidavit of the chairman, and be countersigned by the secretary, and such certificate shall be acknowledged by the chairman and filed as required by the first section of this act, and, when so filed, the capital stock of such corporation shall be increased or diminished to the amount specified in such certificate, and the business extended or changed, as aforesaid, and the company shall be entitled to the privileges and provisions, and be subject to the liabilities of this act, as the case may be.

SEC. 23. If the indebtedness of any such company shall at any time exceed the amount of its capital stock, the trustees of such com-

pany assenting thereto shall be personally and individually liable to such excess to the creditors of such company.

SEC. 24. No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the
339 debt shall become due; and no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company, for any debt so contracted, unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder in such company, nor until an execution against the company shall have been returned unsatisfied in whole or in part.

SEC. 25. It shall be the duty of the trustee of every such corporation or company, to cause a book to be kept, by the treasurer or clerk thereof, containing the names of all persons, alphabetically arranged, who are or shall, within six years, have been stockholders of such company, and showing their places of residence, the number of shares held by them respectively, and the time when they respectively became the owners of such shares, and the amount of stock actually paid in; which book shall, during the usual business hours of the day, on every day except Sunday and the 4th of July, be open for the inspection of stockholders and creditors of the company, and their personal representatives at the office or principal place of business of such company, in the county where its business operation shall be located; and any and every such stockholder, creditor or representative shall have a right to make abstracts from such books; and no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company, according to the provisions of this act, until it shall have been entered therein, as required by this section, by an entry
340 showing to and from *when* transferred such book shall be presumptive evidence of the facts therein stated, in favor of the plaintiff in any suit or proceeding against such company, or against any one or more stockholders. Every officer or agent of any such company, who shall neglect to make any proper entry in such book, or shall refuse or neglect to exhibit the same, or allow the same to be inspected, and abstracts to be taken therefrom, as provided by this section, shall be deemed guilty of a misdemeanor, and the company shall forfeit, and pay to the party injured, a penalty of fifty dollars for every such neglect or refusal, and all the damages resulting therefrom. And every company that shall neglect to keep such books open for inspection, as aforesaid, shall forfeit to the people the sum of fifty dollars for every day it shall so neglect, to be sued for and recovered, in the name of the people, by the district attorney of the county in which the business of such corporation shall be located; and when so recovered, the amount shall be paid into the treasury of such county, for the use thereof.

SEC. 26. Every corporation created under this act shall possess the general powers and privileges, and be subject to the liabilities and restrictions, contained in title third of chapter 18 of the first part of the Revised Statutes.

SEC. 27. This act shall take effect immediately.

CHAPTER 14.

An act to extend the operation and effect of the act passed February 17th, 1848, entitled An act to authorize the formation of corporations for manufacturing, mining, chemical, or mechanical purposes, passed February 7th, 1851.

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The people of the State of New York represented in senate and assembly do enact as follows:

SEC. 1. Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes" passed February 17th, one thousand eight hundred and forty-eight, for the purpose of constructing and running of machines for the raising of vessels or other heavy bodies.

SEC. 2. Every corporation so formed shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefit and — thereby conferred, except that such corporation shall not be confined in their operations to the county in which their certificates shall be filed.

SEC. 3. This act shall take effect immediately.

CHAPTER 333.

An act to amend an act to authorize formation of corporations for mining, mechanical, and chemical purposes, passed February 17th, 1848; passed June 7th, 1853.

The people of the State of New York represented in senate and assembly do enact as follows:

SEC. 1. Any certificate hereafter filed under the provisions of the above-entitled act may designate one or more places where the company may carry on their business.

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SEC. 2. The trustees of such company may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof, in payment therefor, and the stock so issued shall be declared and taken full stock and not liable to any further calls; neither shall the holders thereof be liable for any further payments under the provisions of the tenth section of the said act, but in all statements and reports of the company, to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported, in this respect according to the fact.

SEC. 3. This act shall take effect immediately.

CHAPTER 201.

An act to amend an act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17th, 1848; passed April 13th, 1854.

The people of the State of New York represented in senate and assembly do enact as follows:

SEC. 1. Section 27 of chapter 40 of the laws of eighteen hundred and forty-eight entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes" shall read as follows: Whenever any person or persons, owning fifteen per cent. of the capital stock of any company formed under the provisions of this act, shall present a written request to the treasurer thereof that they desire a statement of the
343 affairs of such company, it shall be the duty of such treasurer to make a statement of the affairs of said company, under oath, embracing a particular account of all its assets and liabilities in minute detail, and to deliver such statement to the person who presented the said written request to said treasurer within twenty days after such presentation and shall also at the same time place and keep on file in his office for six months thereafter a copy of such statement, which shall at all times during business hours be exhibited to any stockholder of said company demanding an examination thereof. Such treasurer, however, shall not be required to deliver such statement in the manner aforesaid oftener than once in any six months. If such treasurer shall neglect or refuse to comply with any of the provisions of this act, he shall forfeit and pay to the person presenting said written request the sum of fifty dollars, and the further sum of ten dollars for every twenty-four hours thereafter, until such statement shall be furnished, to be sued for and recovered in any court having cognizance thereof.

SEC. 2. This act shall take effect immediately.

CHAPTER 301.

An act to extend the operation and effect of the act passed February 17th, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," passed April 12th, 1855.

The people of the State of New York represented in senate and assembly do enact as follows:

SEC. 1. Any three or more persons may organize them-
344 selves into a corporation, in the manner specified and required in an act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17th one thousand eight hundred and forty-eight for the purpose of collecting, storing and preserving ice,

of preparing it for sale, of transporting it to the city of New York or elsewhere, and of vending the same.

SEC. 2. Every corporation so formed shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefits and privileges thereby conferred except that such corporations shall not be confined in their operations to the county in which their certificate shall be filed.

SEC. 3. This act shall take effect immediately.

CHAPTER 29.

An act to amend an act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17th, eighteen hundred and forty-eight; passed February 16th, 1857.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. No incorporated company organized or hereafter to be organized for the manufacture of salt, under the "Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17th one thousand eight hundred and forty-eight, shall be deemed dissolved or
345 shall hereafter be dissolved on account of the capital stock of such company not being paid in the one-half within one year and the other half within two years from the incorporation of such company, provided that such stock shall be paid in within four years from the organization of such company.

SEC. 2. Whenever any company formed under said act shall have fixed the duration of its corporate existence for a less period than it was privileged to do by the first section of said act, it may, by a vote of the stockholders representing a majority of the stock, and upon executing and acknowledging a new or amended certificate under its corporate seal, signed by the president and two-thirds of its directors, and filing the same in the county where its business shall be carried on, and in the office of the secretary of state, extend the term of its corporate existence to a period not longer than it could originally have fixed the same, and shall thereupon possess all the powers and privileges, and be subject to all the liabilities mentioned in said act during such extension of its existence.

SEC. 3. If any company shall be formed under said act, for the purpose of carrying on any part of its business in any place out of this State, the said certificate shall so state, and shall also state the name of the town and county in which the principal part of the business of the said company within this State is to be transacted, and said town and county shall be deemed the town, place and county in which the operation and business of the company are to be carried on and its principal place of business within the
346 meaning of the provisions of this act.

SEC. 4. This act shall take effect immediately.

CHAPTER 262.

An act to amend the "Act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight; passed April 6, 1857.

The people of the State of New York represented in senate and assembly, do enact as follows:

SEC. 1. The first section of the "Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth eighteen hundred and forty-eight, is hereby amended by inserting after the words "any kind of manufacturing, mining, mechanical or chemical business" the words "or the business of printing and publishing books, pamphlets and newspapers."

SEC. 2. This act will take effect immediately.

CHAPTER 269.

An act to amend an act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February seventeenth eighteen hundred and forty-eight; passed April 11, 1860.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February seventeenth, eighteen hundred and
347 forty-eight, is hereby amended so as to allow corporations to be hereafter organized under said act, with not less than three, and not more than thirteen trustees, instead of being limited to nine in number, as provided in said act.

SEC. 2. The number of trustees in any corporation heretofore organized under the said act, may be increased to not more than thirteen, as follows: The existing trustees of any such corporation, or a majority thereof, shall make and sign a certificate, declaring how many trustees the corporation shall have in the future management of its business, and stating the names of the new or additional trustees, which certificate shall be acknowledged or approved by a subscribing witness, and shall be filed in the office of the secretary of state, and in the clerk's office of the county where the original certificate of incorporation was filed; and from and after the filing of such certificate, the trustees of such corporation shall be deemed increased to the number therein stated, and the persons so named shall be trustees until a new election of trustees shall be had, according to said act, and the by-laws or regulations of such corporation.

SEC. 3. This act shall take effect immediately.

CHAPTER 170.

An act to amend an act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight; passed April 12, 1861.

The people of the State of New York, in senate and
348 assembly, do enact as follows:

SEC. 1. Section twenty-six of the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, is hereby amended so as to read as follows:

Every corporation created under this act shall possess the general powers and privileges and be subject to the liabilities and restrictions contained in title third, chapter eighteen of the first part of the Revised Statutes and the provisions of section six, article first, title two, chapter thirteen of the first part of the Revised Statutes, shall apply to every such corporation.

SEC. 2. No company organized under the provisions of said act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes, shall be deemed or taken to have a principal office or place for transacting its financial concerns other than that at which the operations of said company are carried on, unless within the month of May in each year the president and treasurer, or a majority of the trustees shall make duplicate certificates stating the amount of the then capital of said company, and the portion of such capital not invested in real estate, and stating that such company then has a principal office for transacting its financial concerns in a county other than that in which the operations of such company are carried on, stating the town or city and county in which financial office is located and that the presi-
349 dent and treasurer, and a majority of the trustees of said company are then actually residents of the town or city in which such financial office is then located, which duplicate certificates shall be signed and sworn to by the person making the same, and filed the one in the clerk's office of the county in which such financial office shall be. And in case in any year such duplicate certificate shall be and filed as aforesaid, then during the year succeeding the first day of June next after the filing of such certificate, the personal estate of such company shall be assessed only in the town or ward named in the said certificate, as that in which such financial office is located.

SEC. 3. This act shall take effect immediately.

CHAPTER 472.

An act to amend an act entitled "An act to amend an act entitled And act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," passed April thirteenth, eighteen hundred and fifty-four; passed April 23, 1862.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Section one of the act entitled An act to amend an act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed April thirteenth, eighteen hundred and fifty-four, is hereby amended so as to read as follows:

Whenever any person or persons owning five per cent. of the capital stock of any company, not exceeding one hundred
350 thousand dollars, or any person or persons owning three per cent. of the capital stock of any company exceeding one hundred thousand dollars, formed under the provisions of this act shall present a written request to the treasurer thereof that they desire a statement of the affairs of such company, it shall be the duty of such treasurer to make a statement of the affairs of said company, under oath, embracing a particular account of all its assets and liabilities, in minute detail, and to deliver such statement to the person who presented the said written request to said treasurer, within twenty days after such presentation, and shall also at the same time and place keep on file in his office, for six months thereafter, a copy of such statement, which shall at all times during business hours be exhibited to any stockholder of said company demanding an examination thereof; such treasurer, however, shall not be required to deliver such statement in the manner aforesaid, oftener than once in any six months. If such treasurer shall neglect or refuse to comply with any of the provision- of this act, he shall forfeit and pay to the person presenting said written request the sum of fifty dollars, and the further sum of ten dollars for every twenty-four hours thereafter until such statement shall be furnished, to be sued for and recovered in any court having cognizance thereof.

SEC. 2. Should not any written statement as required by section one of this act, be demanded during the year preceding the
351 annual meeting of the stockholders of any company, formed under the provisions of this act, for the election of directors or trustees it shall be the duty of the treasurer of every such company to prepare an exhibit to the stockholders then and there assembled, a general statement of the assets and liabilities of such company.

SEC. 3. This act shall take effect immediately.

CHAPTER 63.

An act to extend the operation and effect of the act passed February seventeenth, eighteen hundred and forty-eight, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," passed March 31, 1863.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any three or more persons may organize themselves into a corporation, in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth eighteen hundred and forty-eight, for the purpose of bottling and selling mineral water, drawn from any natural mineral spring.

SEC. 2. Every corporation as formed shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all benefits and privileges thereby conferred.

CHAPTER 337.

An act to extend the operation and effect of the act passed February seventeenth, eighteen hundred and forty-eight, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed April 23, 1864.

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The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any three or more persons may organize and form themselves into a corporation, in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, one thousand eight hundred and forty-eight, for the purpose of constructing, owning and using vessels and machines to be employed for hire in towing vessels carrying freight and passenger-, and in aiding, protecting and saving vessels and their cargoes wrecked or in distress, on any one of the navigable rivers and lakes in or bordering upon the State of New York, or on the high seas or in the various arms of the seas and rivers running into the same, with all the rights appertaining by law to private individuals performing services as salvers.

SEC. 2. Every corporation so formed shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefits and privileges thereby conferred, except that such corporations shall not be confined in their operation to the county in which their certificate shall be filed.

SEC. 3. Any three or more persons are hereby authorized to organize themselves into a corporation on the manner pro-
353 vided by the said act, and with all the powers, benefits and privileges thereby conferred, and subject to all the duties, liabilities and restrictions therein imposed for the purpose of carrying on the business of constructing, maintaining and using stationery and floating elevators and warehouses for all purposes pertaining to or connected with trade or commerce in the several kinds of grain in the port of New York.

CHAPTER 517.

An act to amend an act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight; passed May 2, 1864, three-fifths being present.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any company formed under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, may change its place or places of business by a vote of the stockholders representing two-thirds of the stock, at any meeting of the stockholders regularly called, and executing and acknowledging and amended certificate specifying the name of the town or city from and to which the business location of the company is to be changed, and in other respects conforming to the original certificate, which amended certificate shall be
354 signed by the president and two-thirds of the directors of the company, and shall be filed in the office of the secretary of state, and in the office of the clerk of the county where the business operations of the company are to be carried on, and published weekly in two papers in the towns or cities from and to which the business operations have been removed, and are to be carried on, for the term of three months. But the property of said company shall be liable to taxation in any county where such property may be or in which its business may be done to the extent of its property in any such county.

SEC. 2. Any corporation formed under the said act passed February seventeenth, eighteen hundred and forty-eight, or of the acts amending or extending the said act, may secure the payment of any debt heretofore contracted, or which may be contracted by it in the business for which it was incorporated, by mortgaging all or any part of the real estate of such corporation; and every mortgage so made shall be as valid to all intents and purposes, as if executed by an individual owning such real estate: Provided that the written assent of the stockholders, holding at least two-thirds of the capital stock of such corporation shall first be filed in the office of the clerk of the county where the mortgaged property is situated.

SEC. 3. This act shall take effect immediately.

CHAPTER 234.

An act to authorize the formation of corporations for agricultural purposes, passed March 29, 1865.

355–365 The people of the State of New York, represented in sen- and assembly, do enact as follows:

SEC. 1. Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, for the purpose of propagating, cultivating, and developing the different varieties of the grape, and the manufacture of wines and brandies therefrom, and cultivating sugar cane, cotton, rice, tobacco, indigo, and other products of the earth, for preparing the same for market, and for transporting and disposing of the same. Every corporation so formed shall be subject to all the provisions and obligations contained in the aforesaid act, and the several acts amendatory of the same, so far as they are or may be applicable, and shall be entitled to all the benefits and privileges conferred by said act and amendatory act; except that such corporation shall not be confined in their operations to the counties in which their certificates shall be filed.

SEC. 2. This act shall take effect immediately.

CHAPTER 307.

An act to extend the operation and effect of the act passed February seventeenth, eighteen hundred and forty-eight, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed April 6, 1875.

366 The people of the State of New York, represented in senate and assembly do enact as follows:

SEC. 1. Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight for the purposes of buying and selling and transporting coal and peat of all kinds.

SEC. 2. Every corporation so formed shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and amendments thereto, and shall be entitled to all the benefits and privileges thereby conferred, except that such corporation shall not be confined in their operations to the county in which their certificate shall be filed.

SEC. 3. This act shall take effect immediately.

CHAPTER 73.

An act to amend an act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," passed February seventeenth, eighteen hundred and forty-eight; passed February 21, 1866.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any company formed under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, may increase the number of shares of which the capital stock consists: Provided the capital stock of such company shall not thereby be increased or diminished.

SEC. 2. Such increase shall be made by a vote of the stockholders in favor thereof representing two-thirds of the capital stock at any meeting of the stockholders called in the manner prescribed, in the act hereby amended, and by executing and acknowledging an amended certificate, specifying the number of shares of which the said capital stock of said company shall thereafter consist and the par value of each share and in other respects conforming to the original certificate, which amended certificate shall be signed by the president and two-thirds of the directors of the company and shall be filed in the office of the secretary of state, and in the clerk's office of the county where the original certificate was filed.

SEC. 3. Each stockholder shall be entitled to a certificate for such a number of shares of said capital stock after the whole number has been increased, as aforesaid as shall at their par value be equal to the par value of the shares theretofore held by him in such company, on surrendering the certificates for said shares so held by him to be cancelled: Provided that such increase shall not so divide the shares as to give the fractional part of a share to any stockholder.

SEC. 4. This act shall take effect immediately.

CHAPTER 371.

An act to extend the operation and effect of the act passed February seventeenth, eighteen hundred and forty-eight, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," passed April 4th, 1866.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of cor-

porations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, for the purposes of accumulation, storing, conducting, furnishing and supplying water for mining purposes, and may acquire, take, hold, lease and convey lands and water power suitable for those purposes.

SEC. 2. Every corporation so formed and the stockholders thereof, shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefits and privileges thereby conferred, except that such corporation shall not be confined in their operations to the county in which their certificate shall be filed.

SEC. 3. It shall and may be lawful for any corporation heretofore incorporated for mining purposes under the act mentioned in said first section, to conduct the business for which the formation of corporations is authorized by said first section, provided the intention so to do shall be specified among the objects for which such
369 corporation is formed in its certificate of incorporation.

SEC. 4. This act shall take effect immediately.

CHAPTER 799.

An act to amend the act passed February seventeenth, eighteen hundred and forty-eight, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and other purposes," passed April 25, 1866.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The first section of the "Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, is hereby amended by inserting after the words "any kind of manufacturing, mining, manufacturing or chemical business," the words "or the business of building and keeping a hotel, or for building and maintaining museums, or for curative purposes.

SEC. 2. The title of said act is hereby amended by inserting after the words "or chemical" the words "or other."

SEC. 3. This act shall take effect immediately.

CHAPTER 838.

An act to amend an act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17, 1848; passed April 28, 1866.

The people of the State of New York, represented in senate and assembly, do enact as follows:

370 SEC. 1. The title of the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, is hereby amended to read as follows: "An act to authorize the for-

mation of corporations for manufacturing, mining, mechanical, chemical, agricultural, horticultural, medical or curative, mercantile or commercial purposes."

SEC. 2. At any time hereafter, any three or more persons may form a corporation for the purpose of carrying on any kind of manufacturing, mining, mechanical, chemical, agricultural, horticultural, medical or curative business may make, sign, and acknowledge, before some officer competent to take acknowledgment of deeds, and file the same in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate in the office of the secretary of state, a certificate in writing in which shall be stated the corporate name of said company, and the object for which it shall be formed, the amount of its capital stock, the number of shares of which said stock shall consist, the term of its existence not exceeding fifty years, the number of its trustees, and the names of those who shall manage the concerns of the company for the first year, and the names of the town or city and county in which the operations of said company shall be carried on.

SEC. 3. It shall be lawful for any manufacturing company, heretofore or hereafter organized under the provision of this act, or the act hereby amended, to hold stock in the capital of any cor-
371 poration engaged in the business of mining, manufacturing or transporting such materials as are required in the prosecution of the business of such company, so long as they shall furnish or transport such material for the use of such company, and for two years thereafter, and no longer; and the trustees of such company shall have the same power with respect to the purchase of such stock and issuing stock therefor as are now given by law with respect to the purchase of mines, manufactures and other property necessary to the business of manufacturing companies. But the capital stock of such company shall not be increased without the consent of the owners of two-thirds of the stock, to be obtained as provided by sections 21 and 22 of the act hereby amended.

SEC. 4. When any such manufacturing company shall be a stockholder in any other corporation, its president or other officer shall be eligible to the office of trustee of such corporation, the same as if they were individually stockholders therein.

SEC. 5. This act shall take effect immediately.

CHAPTER 12.

An act to amend the act passed February 16, 1857, entitled "An act to amend an act entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,' passed February 17, 1848;" passed January 31, 1867.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The second section of the act passed February 16,
372 1857 entitled "An act to amend an act entitled 'An act to authorize the formation of corporations for manufacturing,

mining, mechanical or chemical purposes,' passed February 17, 1848," is hereby amended so as to read as follows:

"SEC. 2. Whenever any company, formed under said act, shall have fixed the duration of its corporate existence for a less period than it was privileged to do by the first section of said act, it may, by a vote of the stockholders, representing a majority of the stock and upon executing and acknowledging a new or amended certificate under its corporate seal, signed by the president and two-thirds of its directors, or trustees, and filing the same in the county where its business shall be carried on, and in the office of the secretary of state, extend the term of its corporate existence from time to time, to a period not longer in the aggregate than it could have originally fixed the same, and shall thereupon possess all the powers and privileges, and be subject to all the liabilities mentioned in said act, during such extension of its existence."

SEC. 2. This act shall take effect immediately.

CHAPTER 248.

An act to amend the act passed April 11, 1860, chapter 269, entitled "An act to amend the act entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,'" passed February 17, 1848; passed April 3, 1867.

The people of the State of New York, represented in senate and assembly, do enact as follows:

373 SEC. 1. The first section of the "Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, is hereby amended by inserting after the words "any kind of manufacturing, mining, mechanical or chemical business" the words "or the business of quarrying stone."

SEC. 2. The second section of said act is hereby amended so as to read as follows:

The number of trustees in any corporation organized before or since the 11th day of April, 1860, or which shall hereafter be organized under the said act, may be increased to not more than thirteen, as follows: The existing trustees of any such corporation, or a majority of them, shall make and sign a certificate declaring how many trustees the corporation shall have in the future management of its business, and stating the names of the new or additional trustees, which certificate shall be acknowledged by the trustees signing the same, or proved by a subscribing witness, and shall be filed in the office of the clerk of the county where the original certificate of the corporation was filed; and a duplicate or transcript thereof, duly certified under the official seal of such clerk, file- in the office of the secretary of state; and from and after the filing of such certificate and duplicate, or transcript, the trustees of such corporation shall be deemed increased to the number therein stated, and the persons so named therein shall be trustees until a new election of trustees

shall be had, according to the said act and by the laws or
374 regulations of such corporation.

SEC. 3. This act shall take effect immediately.

CHAPTER 937.

An act to enable companies or corporations organized under any general law to extend the term of their existence, passed May 17, 1867.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any company or corporation heretofore formed under any general law of this State, at any time within three years of the expiration of its term of existence, may extend the term of existence of such company or corporation beyond the time mentioned in the original articles of the association or certificate of incorporation, by consent of the stockholders owning two-thirds in amount of the capital stock of such company or corporation, in and by a certificate to be signed by such stockholders and acknowledged or approved, so as to enable it to be recorded, which certificate shall be filed in the office of the secretary of state, and in the office of the clerk of the county in which its original certificate or articles of association, if any, are filed and recorded; and the said secretary of state and the clerk of such county shall, upon such filing, record the same in the books kept in their respective offices for the record of articles of association, and make a memorandum of such record in the margin of the original articles of association, in such book and thereupon the time of the existence of such company
375 shall be extended, as designated in such certificate, for a term not exceeding the term for which said company or corporation was organized in the first instance.

SEC. 2. This act shall take effect immediately.

CHAPTER 960.

An act to authorize the consolidation of corporations organized under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, or any of the acts amending or extending the same, whenever the objects for which companies had been respectively organized was the same or of a similar nature, are hereby authorized to consolidate such companies into a single corporation, in manner following: The trustees of any two or more of such corporations may enter into and make an agreement, under their respective corporate seals, for the consolidation of the said corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of trustees thereof, (not less than three nor more than thirteen), the names of the trustees who shall manage the concerns of the new company for the first year until others shall be elected

in their places, the name of the town or towns, county or counties, in which the operations of the new company shall be carried on; and if such companies proposed to be consolidated, or either of them, shall have been organized for the purpose of carrying of any part of their or its business in any place out of this State, and the
376 said new company shall propose to carry on any part of its business out of this State, the said agreement shall so state, and it shall also state the name of the town or city and county in which the principal part of the business of said new company within this State is to be transacted; the amount of capital and the number of shares of the stock into which the same is to be divided (which capital shall not be larger in amount than the aggregate amount of capital of the several companies thus to be consolidated and shall not be increased except in accordance with the provisions of the said first-mentioned act, passed February 17, 1848); the manner of converting the shares of capital stock in each of said corporations into the shares of such new corporation, with such other particulars as they may deem necessary, not inconsistent with the provisions of the said act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes" passed February 17, 1848, and the act amending or extending the same.

SEC. 2. Such agreement of the directors shall not be deemed to be the agreement of the said corporations so proposing to consolidate, until after it has been submitted to the stockholders of each of said corporations, respectively, separately at a meeting thereof to be called upon a notice of at least thirty days, specifying the time and place of such meeting and the object thereof, to be addressed to each of said stockholders, when their place of residence is known to the secretary and deposited in the post office, and published for
377 at least three successive weeks in the State paper, and in one of the newspapers published in each of the counties in which either of the said corporations shall have its place of business, and has been sanctioned and approved by such stockholders, by the vote of at least two-thirds in amount of the stockholders present at such meetings respectively, voting by ballot in regard to such agreement, either in person or by proxy, each share of such capital stock being entitled to one vote; and when such agreement of the directors has been sanctioned and approved by each of the meetings of the respective stockholders separately, after being submitted to such meetings in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said several corporations; and a sworn copy of the proceedings of such meetings, made by the secretaries thereof respectively, and attached to the said agreement, shall be evidence of the holding and of the action of such meetings in the premises. If any stockholder shall, at said meeting of stockholders or within twenty days thereafter, object to said consolidation and demand payment for his stock, such stockholder or such new company may, if said consolidation take effect at any time thereafter, apply to the supreme court, at any special term thereof, held in any county in which the said new corporation may have its

place of business, for the appointment of three persons to appraise the value of said stock, and shall designate a time and place of meeting of such appraisers, and give such direction in regard to the proceeding on said appraisement as shall be deemed proper, and
378 shall also direct the manner in which payment for said stock shall be made to such stockholders. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or any two of them, after being sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent as aforesaid, and deliver one copy of their appraisal to the said company and another to the said stockholder if demanded; the charges and expenses of the appraise-s shall be paid by the new company. When the corporation shall have paid the amount of the appraisal, as directed by the court, such stockholder shall cease to have any interest in the said stock and in the corporate property of the said corporation, and the said stock may be held or disposed of by the said corporation.

SEC. 3. Upon the making, sanctioning and approving of the said agreement, in the preceding section mentioned, in the manner therein required, and the filing of the duplicates or the counterparts thereof, and of the verified written assent of stockholders mentioned in the preceding section, in the office of the clerk of the county where the operations of said new company were to be carried on, and in the office of the secretary of state, then and immediately thereafter, the said corporation agreed to be consolidated shall be merged in the new corporation provided for in the said agreement, to be known by the corporate name therein mentioned, and the
379 details of such agreement shall be carried into effect as provided therein, only such new corporation shall not have any larger powers than are granted by the said act mentioned in the first section hereof, and the acts amending and extending the same, nor be exempt from the performance of any duty which the said several corporations may be liable to perform.

SEC. 4. Such new company shall possess the general powers and be subject to the general liabilities and restrictions expressed in the third title of the 18th chapter of the first part of the Revised Statutes, and to all the liabilities and restrictions to which either of the companies from which it has been formed was subject. It shall also have the general powers and privileges, and be subject to the general liabilities, restrictions, duties, and provisions expressed and contained in the said act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, and the acts amending or extending the same, as far as the same may be applicable to a corporation organized for the purposes expressed in the said agreement for consolidation, and for which said new company shall have been organized.

SEC. 5. Upon the consolidation of said corporations and the organization of said new company, as hereinbefore prescribed, all and singular the rights, franchises and interests of the said several cor-

porations so consolidated in and to every species of property, real, personal and mixed, and things in action thereunto belonging
380 shall be deemed to be transferred to and vested in such new corporation without any other deed or transfer; and such new corporation shall own and enjoy the same, and all rights of property, franchises and interests, in the same manner and to the same extent as if the said several corporations so consolidated should have continued to retain the title and transact the business of such corporations, and the title — old real estate acquired by either of the said corporations shall not be deemed to revert or be impaired by means of such act of consolidation or anything relating thereto.

SEC. 6. The rights of creditors of any corporation that shall be so consolidated, shall not in any manner be impaired by any act of consolidation nor shall any liability or obligation for the payment of any money now due, or hereafter to become due, to any person or persons, or any claim or demand in any manner or for any cause existing against any such corporation or against any stockholder thereof, be in any manner released or impaired, but such new corporation is declared to succeed to such obligation and liabilities, and to be held liable to pay and discharge all such debts and liabilities of each of the corporations that shall be so consolidated in the same manner as if such new corporation had itself incurred the obligation or liability to pay such debt or damages; and the stockholders of the respective corporations so entering into such consolidation shall continue subject to all the liabilities, claims and demands existing against them as such at or before such consolidation;
381 and no suit, action, or other proceeding then pending before any court or tribunal in which one corporation which may be so consolidated is a party, shall be deemed to have abated or discontinued by reason of any such consolidation, but the same may be prosecuted to final judgment in the same manner as if the said corporation had not entered into the same agreement of consolidation, or the said new corporation may be substituted as a party in the place of any corporation so consolidated as aforesaid with any other corporation or corporations and forming such new corporation, by order of the court in which such action, suit or proceeding may be pending.

SEC. 7. No companies consolidated under this act shall be permitted to prosecute or carry on more than one kind of business authorized by the said act, passed February 17, 1848.

SEC. 8. This act shall take effect immediately.

CHAPTER 161.

An act relative to incorporation for fishing purposes, passed April 11, 1868.

The people of the State of Nw York, represented in senate and assembly, do enact as follows:

SEC. 1. At any time hereafter any two or more persons who may desire to form a company for the purpose of catching such fish in

the salt waters of Suffolk county as are not fit for food for man, by sein-s or otherwise, to be used for or to be converted into fertilizers, may make, sign and acknowledge before some notary public, and file in the office of the clerk of Suffolk county, and a duplicate thereof in the office of the secretary of state, a certificate
382 in writing in which shall be stated the corporate name of the company, the object for which the company shall be formed, the amount of the capital stock of the said company, the term of its existence, not to exceed fifty years, the number of shares of which the said stock shall consist, the number of trustees and their names, who shall manage the concerns of the company for the first year, and the name of the town in Suffolk county in which the operations of said company are to be carried on.

SEC. 2. The companies formed under this act shall be subject to the provisions of chapter 40 of the Laws of 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," and the various amendments thereto, so far as the same may be applicable. Each stockholder shall be personally liable for the debts of said company in an amount equal to the stock held or owned by him.

SEC. 3. This act shall take effect immediately.

CHAPTER 781.

An act to amend the act entitled "An act to extend the operation and effect of the act passed February 17, 1848, entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,'" passed April 23rd, 1864; passed May 9, 1868.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Section 3 of the act entitled "An act to extend the
383 operation and effect of the act, passed February 17, 1848, entitled 'An act to authorize the formations of corporations for manufacturing, mining, mechanical or chemical purposes,'" passed April 23rd, 1864, is hereby amended so as to read as follows:

SEC. 3. Any three or more persons are hereby authorized to organize themselves into a corporation in the manner provided by the said act, and with all the powers, benefits and privileges thereby conferred, and subject to all the duties, liabilities and restrictions therein imposed, for the purpose of carrying on the business of constructing, maintaining and using stationery and floating elevators, or warehouses, for all purposes pertaining to or connected with trade or commerce in the several kinds of grain, in the State of New York, or for the purpose of purchasing a suitable lot and erecting thereon a building to be used as a skating rink, and for holding fairs, meetings, exhibitions and all other lawful entertainments and amusements.

SEC. 2. This act shall take effect immediately.

CHAPTER 605.

An act to amend an act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes, passed February 17, 1848; passed May 5, 1869.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or
384 chemical purposes," passed February 17, 1848, is hereby amended by inserting in the first section thereof after the words "manufacturing, mining, mechanical or chemical" the words "or elevating, warehousing, storing or milling," so that under said act, and the acts amendatory thereof, it shall be lawful to form companies on the elevating, warehousing, storing or milling business, jointly or separately.

SEC. 2. This act shall take effect immediately.

CHAPTER 706.

An act with reference to mortgages by corporations organized under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," passed February 17, 1848, and the acts amending or extending the same; passed May 7, 1869.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC 1. The directors of any corporation organized under any general act for the formation of companies, in whose original certificate of incorporation, an informality may exist by reason of an omission of any matters required to be stated therein, are hereby authorized to make and file an amended certificate or certificates of incorporation, to conform to the general act under which said corporation may be organized; and upon the making and filing of such amended certificate, the said corporation shall, for all purposes, be deemed and taken to be a corporation from the filing of such original certificate.

385 SEC. 2. Nothing in this act contained shall in any manner effect any suit or proceeding, at the time of filing such amended certificate, pending against said corporation or impair any rights already accrued.

SEC. 3. This act shall take effect immediately.

CHAPTER 322.

An act to authorize corporations to change their names, passed April 21, 1870.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any incorporation, incorporated company, society or asso-

ciation organized under the laws of this State, excepting banks, banking associations, trust companies, life, health, accident, marine and fire insurance companies, railroad companies and corporations created by special charter, may apply at any term of the supreme court of the judicial district in which shall be situated the corporate property of such corporation, or its chief business office, if any, for an order to authorize it to assume another corporate name.

SEC. 2. Such application shall be by petition, which shall set forth the grounds of the application, and shall be verified by the chief officer of the corporation. Notice of such application shall be published for six weeks in the State paper, and in a newspaper in every county of which such corporation shall have a business office or if it have no business office, at the county in which its principal corporate property be situated, such newspaper to be one of
386 those designated to publish the session laws; and it must appear to the satisfaction of the court that such notice has been so published, and that the application has been made in pursuance of a resolution of the directors, trustees or other managers of the corporation applying.

SEC. 3. If the court to which such application is made shall be satisfied, by such petition so verified, or by other evidence, that there is no reasonable objection to such corporation changing its name, it may make an order authorizing it to assume the new corporate name. A copy of said order shall be filed in the office of the secretary of state and with the county clerk of every county in which said corporation has a business office, or if it have no business office, of the county in which its principal corporate property is situated and be published at least once in each week for four weeks in every county where such corporation has a business office, or if it have no business office, in the county in which its principal property is situated, such newspaper to be designated by the court.

SEC. 4. When the requirements of this act shall have been complied with, the corporation applying for a change of name may, from and after the day specified in the order of the court, be known by and use the new corporate name designated in the order of the court.

SEC. 5. No suit or legal proceeding commenced by or in behalf of or against any corporation shall abate by reason of a change of its corporate name made as herein authorized. Such change
387 of the corporate name of the said corporation or company shall in no way effect the rights or liability of such a corporation or company. All obligations of said company or corporation may be enforced against said corporation or company in the changed name, and all action and proceeding commenced and pending against said corporation or company at the time the said corporate name was changed, shall be continued in the name in which the said action or proceedings were commenced or the county may, on the application of either party, allow the action or proceeding to be continued in the corporate name to which said corporation or company has been changed.

SEC. 6. This act shall take effect immediately.

CHAPTER 481.

An act to amend an act passed May second, 1864, and entitled "An act to amend an act entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes,'" passed February 17, 1848; passed April 13, 1871.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The second section of the act entitled "An act to amend an act entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes,' passed February 17, 1848," passed May second, 1864, is hereby amended so as to read as follows:

SEC. 2. Any corporation formed under the said act, passed February 17, 1848, or of the acts amending or extending the said
388 act, may secure the payment of any debt heretofore contracted or which may be contracted by it in the business for which it was incorporated, by mortgaging all or any part of the real or personal estate of such corporation and every mortgage so made shall be as valid to all intents and purposes as if executed by an individual owning such real or personal estate, provided, that the written assent of the stockholders owning at least two-thirds of the capital stock of such corporation shall first be filed in the office of the clerk of the county where the mortgaged property is situated.

SEC. 2. This act shall take effect immediately.

CHAPTER 535.

An act to extend the operation and effect of the act passed February 17, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," passed April 15, 1871.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any three or more persons may organize themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes" passed February 17, 1848, for the purpose of purchasing, acquiring and improving real estate for residence and homestead, and apportioning and distributing the same among the stockholders and members of such corporation. The corporation so formed shall be subject to all the provisions and obligations of the act aforesaid, and the
389 act amendatory thereof; and it shall have power to take and hold by purchase, contract or lease, and convey such real estate as shall be necessary to carry out the object of such corporation, and it may distribute and apportion the same among its members and stockholders in such manner as may be determined by its by-laws,

provided, however, that it shall not be lawful for such corporation to hold at any one time real estate, the market value of which shall exceed the sum of five hundred thousand dollars.

SEC. 2. This act shall take effect immediately.

CHAPTER 657.

An act to amend the act passed February 17, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed April 20, 1871, three-fifths being present.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The first section of the "Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, as said section was amended by chapter 799 of the Laws of 1866, is hereby further amended by substituting for the words, "or the business of building and keeping a hotel," the words following, viz: "or the business of erecting buildings for hotel purposes or keeping a hotel or either or both such purposes." The provision of this section shall apply to all corporations formed for either of the above purposes, since the first day of January, 1869.

390 SEC. 2. Said section one of the said act, passed February 17, 1848, as amended by section one of chapter 262 of the Laws of 1857, is hereby amended by inserting after the words "or the business of printing and publishing books, pamphlets and newspapers," in the first section of the last-mentioned act, the words "or the business of preserving and dealing in meats."

SEC. 3. Section 12 of the said act, passed February 17, 1848, is hereby amended by adding thereto the following: "But whenever under this section, a judgment shall be recovered against a trustee severally, all the trustees of the company shall contribute a ratable share of the amount paid by such trustee on such judgment, and such trustee shall have a right of action against his cotrustees, jointly or severally, to recover from them their proportion of the amount so paid on such judgment.

SEC. 4. This act shall take effect immediately.

CHAPTER 426.

An act to amend chapter 657 of the Laws of 1871, entitled "An act to amend the act passed February 17, 1848, entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,'" passed April 20, 1871; passed April 27, 1872, three-fifths being present.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Section two of chapter 657 of the Laws of 1871, entitled

"An act to amend the act passed February 17, 1848, entitled
391 'An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,'" is hereby amended so as to read as follows:

SEC. 2. Said section one of the said act passed February 17, 1848, as amended by section 1 of chapter 262 of the Laws of 1857, is hereby amended by inserting after the words "or the business of printing and publishing books, pamphlets and newspapers," in the first section of the last-mentioned act, the words, "or the business of preserving and dealing in meats, or the business of making butter, cheese, concentrated or condensed milk, or any other product of the dairy; or the business of erecting buildings for church, sheds or laundry purposes, and the carrying on of laundry business.".

SEC. 2. This act shall take effect immediately.

CHAPTER 814.

An act to extend the operation and effect of the act passed February 17, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed June 19, 1873, three-fifths being present.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any nine or more persons may organize themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, for the purpose of building, manufactur-
392 ing, owning, furnishing letting, selling and maintaining locomotive engines, cars, rolling stock and machinery to be used or operated upon railways, or any one or more of said purposes.

SEC. 2. Every corporation so formed shall be entitled to all the benefits and privileges conferred by the before-mentioned act, and may contract and transact its business with any railway company or other person engaged in the operation of any railway in the United States or Canada, but shall otherwise be subject to all the provisions, duties and obligations in the said act contained.

SEC. 3. This act shall take effect immediately.

CHAPTER 149.

An act to amend the act passed April 27, 1872, entitled "An act to amend chapter 657 of the Laws of 1871, entitled 'An act to amend the act passed February 17, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed April 20, 1871;'" passed April 10, 1874.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The first section of the act entitled "An act to authorize

the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, as amended by chapter 262 of the Laws of 1857, as amended by section 2 of chapter 657 of the Laws of 1871, as amended by chapter 462 of the Laws of 1872, is hereby amended so as to read as follows:

SEC. 1. At any time hereafter any three or more persons
393 who may desire to form a company for the purposes of carrying—any kind of manufacturing, mining, mechanical or chemical business, or the business of printing and publishing books, pamphlets and newspapers, or the business of preserving and dealing in meats, or the business of making butter, cheese, concentrated or condensed milk, or any other product of the dairy, or the business of erecting buildings for church, sheds or laundry purposes, and the carrying on of laundry business, or the purpose of slaughtering animals, may make, sign and acknowledge, before some officer competent to take the acknowledgment of deeds and file in the office of the clerk of the county, in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of the said company and the object for which the company shall be formed, the amount of the capital stock of the said company, the term of its existence (not to exceed fifty years), the number of shares of which the said stock shall consist, the number of trustees and their names, who shall manage the concerns of the company for the first year, and the names of the town and county in which the operations of the said company are to be carried on.

SEC. 2. The stockholders of any corporation hereafter to be formed under the act hereby amended or any act amendatory thereof or supplementary thereto, or extending the operation and effect thereof,
shall in addition to the liabilities provided for in said act, be
394 individually responsible, equally and ratably, in an amount to the extent of their respective shares of stock in such corporation. The term stockholder as used in this section, shall apply not only to such persons as appear by the books of the corporation or association to be such, but also to every equitable owner of stock although the same may appear on such books in the name of another person; and also to every person who shall have advanced the installments or purchase-money of any stock in the name of any person under 21 years of age, and while such person remains a minor, to the extent of such advance; and also to every guardian or other trustee who shall voluntarily invest any trust funds in such stock; and no trust funds in the name of such guardian or trustee shall be in any way liable under the provisions of this act, and the acts aforesaid, by reason of any such investment, nor shall the person for whose benefit any such investment may be made, be responsible in respect to such stock until 30 days after the time when such persons respectively, become competent and able to control and dispose of the same; but the guardian or other trustee making such investment as aforesaid, shall continue responsible as a stockholder until such responsibility devolves upon the person beneficially in-

terested therein, and, in respect to stock held by guardian or other trustee under a transfer of the same by a third person or under positive directions by a third person for such investment, the person making such transfer or giving such direction, and his executor and administrator shall, for the purposes of this act and the act
395 aforesaid, be deemed a stockholder, and the estate of such person, if he be deceased, shall be responsible for the debt and liabilities chargeable on such stock, according to the provisions of this act.

CHAPTER 113.

An act to extend the operation and effect of the act passed February 17, 1848, entitled "An act to authorize the formation of a corporation for manufacturing, mining, mechanical, or chemical purposes," passed April 17, 1875.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February 17, 1848, for the storage, conveyance and transportation of petroleum and other oils, so that under said act, and the act amendatory thereof it shall be lawful to form companies for carrying on the business of storing, conveying and transporting petroleum and other oils and of doing all things necessary and proper therefor subject to such laws and regulations as are now or may hereinafter be in force in the several cities in this State, where such business may be conducted relating to the storage and safe keeping of petroleum and other oils.

SEC. 2. Every corporation shall be subject to all the provisions, duties and obligations contained in the above-mentioned act,
396 and shall be entitled to all the benefits and privileges thereby conferred.

SEC. 3. This act shall take effect immediately.

CHAPTER 365.

An act to extend the operation and effect of the act passed February 17, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," passed May 15, 1875.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, for the purpose of constructing and using machines for dredging and filling of land and dock

building, or for the construction and operation of inland wharves and basins, and the purchase, improvement and sale thereof.

SEC. 2. Every corporation so formed shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefits and privileges thereby conferred.

SEC. 3. This act shall take effect immediately.

CHAPTER 510.

An act to amend chapter 657 of the Laws of 1871, entitled "An act to amend the act passed February 17, 1848, entitled 'An act to authorize the formation of corporations for manufacturing,
397 mining, mechanical, or chemical purposes,'" passed April 20, 1871; passed June 7, 1875.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The 12th section of the "Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, as said section was amended by chapter 657 of the Laws of 1871, is hereby further amended so that section 12 shall read as follows:

SEC. 12. Every such company shall within 20 days from the first day of January, if a year from the time of the filing of the certificate of incorporation shall then have expired and, if so long a time shall not have expired, then within 20 days from the first day of January in each year after the expiration of a year from the time of the filing of such certificate, make a report which shall be published in some newspaper published in the town, city or village, if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of the company is carried on, which shall state the amount of capital, and of the proportion actually paid in and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on and if any of said company shall fail so to do all the trustees of the company shall be jointly and severally liable
398 for all the debts of the company then existing and for all that shall be contracted before such report shall be made; but whenever under this section a judgment shall be recovered against a trustee severally, all the trustees of the company shall contribute a rateable share of the amount paid by such trustee on such judgment, and such trustee shall have a right of action against his cotrustees, jointly or severally to recover from them their proportion of the amount so paid on such judgment; provided that nothing in this act contained shall affect* any action now pending.

SEC. 2. This act shall take effect immediately.

*So in the original.

CHAPTER 280.

An act further to amend chapter 322 of the Laws of 1870, entitled "An act to authorize corporations to change their names," passed May 15, 1876.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. Section one of chapter 322, of the Laws of 1870, entitled "An act to authorize corporations to change their names," is hereby amended so as to read as follows:

SEC. 1. Any incorporation, incorporate company, society or association organized under the laws of this State, excepting banks, banking associations, trust companies, life, health, accident, marine and fire insurance companies may apply at any special term of the supreme court sitting in the county in which shall be situated its chief business office for an order to authorize it to assume another corporate name.

399 SEC. 2. This act shall take effect immediately.

CHAPTER 358.

An act to amend chapter 838 of the Laws of 1866, entitled "An act to amend an act entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,' passed February 17, 1848;" passed May 19, 1876.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Section 3 of chapter 838 of the Laws of 1866, entitled "An act to amend an act entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,' passed February 17, 1848," is hereby amended so as to read as follows:

SECTION 3. It shall be lawful for any company heretofore or hereafter organized under the provisions of this act, or the act hereby amended, to hold stock in the capital of any corporation engaged in the business of mining, manufacturing, or transporting such materials as are required in the prosecution of the business of such company so long as they shall furnish or transport such materials for the use of such company and for two years thereafter and no longer; and also to hold stock in the capital of any corporation which shall use or manufacture materials mined or produced by such company, and the trustees of such company shall have the same power with respect to the purchase of such stock and issuing stock therefor as are now given by the law with respect to
400 the purchase of mines, manufacturies and other property necessary to the business of manufacturing, mining, and other companies. But the capital stock of such companies shall not be increased without the consent of the owners of two-thirds of

the stock to be obtained as provided by sections 21 and 22 of the act hereby amended.

SEC. 2. This act shall take effect immediately.

CHAPTER 363.

An act to repeal part of chapter 149 of the Laws of 1874, entitled "An act to amend the act passed April 27, 1872, entitled 'An act to amend chapter 657 of the Laws of 1871, entitled 'An act to amend the act passed February 17, 1848, entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,' passed April 20th, 1871;" passed May 19, 1876.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Section 2 of chapter 149 of the Laws of 1874, which reads as follows: "The stockholders of any corporation hereafter formed under the act hereby amended, or any act amendatory thereof and supplementary thereto, or extending the operation and effect thereof, shall in addition to the liabilities provided for in said acts, be individually responsible, equally and ratably in an amount to the extent of their respective shares of stock in such corporation. The term stockholder, as used in this section, shall apply not only to such persons as appear by the books of the corporation or association to be such, but also to every equitable owner of stock,
401 although the same may appear on such books in the name of another person; and also to every person who shall have advanced the installments of purchase-money of any stock in the name of any person under 21 years of age, and while such person remains a minor, to the extent of such advance; and also to every guardian or other trustee who shall voluntarily invest any trust funds in such stock; and no trust funds in the hands of any such guardian or trustee shall be in any way liable under the provisions of this act and the acts aforesaid, by reason of any such investment, nor shall the person for whose benefit any such investment may be made be responsible in respect to such stock until 30 days after the time when such persons, respectively, become competent and able to control and dispose of the same; but the guardian or other trustee making such investment as aforesaid shall continue responsible as a stockholder until such responsibility devolves upon the person beneficially interested therein; and in respect to stock held by a guardian or other trustee under a transfer of the same by a third person, or under positive directions by a third person for such investment, the person making such transfer or giving such directions, and his executors and administrators shall, for the purposes of this act and the act aforesaid, be deemed a stockholder, and the estate of such person if he be deceased, shall be responsible for the debts and liabilities chargeable on such stock according to the provisions of this act," is hereby repealed.

SECTION 2. This act shall take effect immediately.

402 CHAPTER 442.

An act relative to the dissolution of corporations, passed June 2, 1876, three-fifths being present.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Whenever the trustees of a corporation now existing or which may hereafter be formed, created under or pursuant to the general statutes of this State authorizing the formation of corporations for manufacturing, mining, mechanical or chemical purposes, shall consist of an even number of persons, and they shall be equally divided as to the management of affairs of said corporation, and the whole stock of such corporation, at the time of such disagreement, shall be owned by the persons being the trustees, or so divided that one-half thereof be owned or controlled by persons favoring the course of half the number of trustees, and the other half thereof by persons favoring the course of the other half of the number of trustees, the supreme court is hereby authorized in its discretion, upon the application of the trustees, or any or either of them either upon petition or by action, to dissolve said corporation and to take charge of and wind up its affairs, and for that purpose to appoint one or more receivers thereof, with the usual powers and authority of receivers, appointed upon the voluntary dissolution of corporations; and after paying the expenses of such receivership and the debts and liabilities of the corporation, the residue of the assets of said corporation shall be distributed *shall be distributed* among the
403 stockholders in proportion to their several interests therein.

SEC. 2. This act shall take effect immediately.

CHAPTER 374.

An act to amend chapter 149 of the Laws of 1874, entitled "An act to amend the act passed April 27, 1872, entitled 'An act to amend chapter 657 of the Laws of 1871, entitled 'An act to amend the act passed February 17, 1848, entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,' passed April 20, 1871," and also to amend chapter 960 of the laws of 1867, entitled "An act to authorize the consolidation of incorporations organized under the act entitled 'An act to authorize the formation of corporation- for manufacturing, mining, mechanical, or chemical purposes,' passed February 17, 1848, or any of the acts extending or amending the same, passed June 2, 1877, three-fifths being present.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Section 1 of chapter 149 of the Laws of 1874 entitled "An act to amend the act passed April 27, 1872, entitled 'An act to amend chapter 657 of the Laws of 1871,' entitled 'An act to amend the act passed February 17, 1848, entitled 'An act to authorize the forma-

tion of corporations for manufacturing, mining, mechanical or chemical purposes,' passed April 20, 1871," is hereby amended so as to read as follows:

SEC. 1. Any time hereafter any three or more persons who
404 may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business or the business of printing and publishing of books, pamphlets and newspapers, or the business of preserving and dealing in meats, or the business of making butter, cheese, concentrated or condensed milk, or any other product of the dairy, or the business of erecting buildings for church sheds, or laundry purposes, and the carrying on of laundry business, or the business of slaughtering animals, or for the purpose of towing or propelling canal boats, vessels, rafts or floats on the canals and navigable rivers of the State of New York, by animal or steam power, their operations not to be confined to the county in which their certificates shall be filed, may make, sign and acknowledge, before some officer competent to take the acknowledgement of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of the company, and the objects for which the company shall be formed, the amount of the capital stock of the said company, the term of its existence (not to exceed fifty years), the number of shares of which the said stock shall consist, the number of trustees and their names, who shall manage the concerns of the said company for the first year, and the names of the town and county in which the operations of the said company are to be carried on.

SEC. 2. Section 1 of chapter 960 of the Laws of 1867, entitled
405 "An act to authorize the consolidation of corporations organized under the act entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, or any of the acts amending or extending the same, is hereby amended so as to read as follows:

SEC. 1. Any two or more corporations organized under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, or any of the acts amending or extending the same, whenever the objects for which such companies had been respectively organized were the same or of a similar nature, are hereby authorized to consolidate such companies into a single corporation in manner following; the trustees of any two or more of such corporations may enter into and make an agreement under their respective corporate seals, for the consolidation of the said corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of trustees thereof (not less than three, nor more than thirteen), the names of the trustees who shall manage the concerns of the new company for the first year and until others shall be elected in their places, the name or names, county or counties, in which the operations of the new company are to be carried on; and if such compa-

nies proposed to be consolidated, or either of them shall have been organized for the purpose of carrying on any part of their business or its business out of this State, and the said new company shall
406 propose to carry on any part of its business out of this State the said agreement shall so state; and it shall also state the name of the town or city and county in which the principal part of the business of said new company within this State was to be transacted; the amount of capital and number of shares of the stock into which the same is to be divided (which capital shall not be larger in amount than the aggregate amount of capital of the several companies thus to be consolidated, and shall not be increased except in accordance with the provisions of the first-mentioned act, passed February 17, 1848); the manner of converting the shares of the capital stock in each of the said corporations into the shares of such new corporation, with such other particulars as they deem necessary, not inconsistent with the provisions of the said act, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, and the acts amending or extending the same.

SEC. 2. This act shall take effect immediately.

CHAPTER 163.

An act to authorize corporations formed for manufacturing, mining, mechanical, or chemical purposes to mortgage their property and franchises, passed April 20, 1878.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any company formed under the act entitled "An act to authorize the formation of corporations for manufacturing,
407 mining, mechanical orchemical purposes," passed February 18, 1848, or of the acts amending or extending said act, may secure the payment of any debt heretofore contracted or which may be contracted by it, in the business for which it was incorporated, by mortgaging all or any part of the goods and chattels of such corporation, and also the franchises, privileges, rights, and liberties thereof, provided that a written assent of a majority of the stockholders owning at least two-thirds of the capital stock of such corporation, shall first be filed in the office of the clerk of the county where the corporation has its principal place of business, and also in the office of the clerk of the county where such goods and chattels are situated.

SEC. 2. This act shall take effect immediately.

CHAPTER 264.

An act to authorize corporations organized under the laws of this State to reduce their capital stock, passed May 15, 1878.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Any corporation or company organized under general or special law of this State, and now existing, or which may hereafter be organized under such general or special law, may diminish its capital stock by complying with the provisions of this act to any amount which may be deemed sufficient and proper for the purposes of the corporation, but nothing in this act shall be so construed as to relieve any holder or owner of stock in such corporation
408 from any personal liability existing prior to such reduction; provided that nothing in this act contained shall be construed to in any manner interfere with or affect any law now in existence, authorizing any corporation heretofore organized to reduce its capital stock.

SEC. 2. Whenever any company shall desire to call a meeting of the stockholders for the purpose of diminishing the amount of its capital stock it shall be the duty of the trustees or directors to publish a notice signed by at least a majority of them, in a newspaper in the county in which the business of the company is carried on, or its principal office is located, if any, shall be published therein at least three successive weeks, and to deposit a written or printed copy thereof in the post office addressed to each stockholder, at his usual place of residence at least three weeks previous to the day fixed upon for holding such meeting, specifying the object of the meeting, the time and place, when and where such meeting shall be held, and the amount to which it shall be proposed to diminish the capital, and a vote of at least two-thirds of all the shares of the stock shall be necessary to a diminution of the amount of its capital stock.

SEC. 3. If at the time and place specified in the notice provided for in the preceding section of this act, the stockholders shall appear in person or by proxy in numbers representing at least two-thirds of all the shares of the stock of the corporation, they shall organize by choosing one of the trustees chairman of the meeting, and
409 also a suitable person for secretary, and proceed to a vote of those present or by proxy, and if, in canvassing the votes, it shall be found that a sufficient number of votes has been in favor of diminishing the amount of capital, a certificate of the proceedings showing a compliance with the provision of this act, the amount of capital actually paid in, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be diminished, shall be made, signed and verified by the chairman, and such certificate shall be acknowledged by the chairman and filed in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, with the approval of the controller endorsed thereon, to the effect that the reduced capital is sufficient for the purposes of the company, and is in excess of all debts and liabilities of the company, exclusive of debts secured by trust mortgages, and that the actual market value of the stock of the company prior to the reduction of the capital was less than the par value of the same, and when so filed the capital stock of such corporation shall be reduced to the amount so specified in such certificate.

SEC. 4. This act shall take effect immediately.

CHAPTER 316.

An act to amend chapter 248 of the Laws of 1867, entitled "An act to amend the act passed April 11, 1860, chapter 269, entitled 'An act to amend the act entitled 'An act to authorize the
410 formation of corporations for manufacturing, mining, mechanical, or chemical purposes,'" passed February 17, 1848; passed May 22, 1878.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The second section of chapter 248 of the Laws of 1867, entitled "An act to amend the act passed April 11, 1860, chapter 269, entitled 'An act to amend an act entitled 'An act to authorize the formation of — manufacturing, mining, mechanical or chemical purposes,'" passed February 17, 1848, is hereby amended so as to read as follows:

SECTION 2. The number of trustees in any corporation organized before, or since, the 11th day of April, 1860, or which shall hereafter be organized under the said act, may be increased to not more than thirteen, or may be reduced to not less than three, as follows; the existing trustees of any such corporation, or a majority of them, shall make and sign a certificate, declaring how many trustees the corporation shall have in the future management of its business, and, in case the number of trustees be increased, stating the names of the new or additional trustees, and in case the number of trustees be reduced, stating the number to which the trustees shall be reduced; which certificate shall be acknowledged by the trustees signing the same, or approved by a subscribing witness, and shall be filed in the office of the clerk of the county where the original certificate of incorporation was filed, and a duplicate or transcript thereof, duly certified under the official seal of such clerk, filed in the office of the secretary of state; and
411 in the case of and increase of the number of trustees, from and after the filing of such certificate and duplicate or transcript, the trustees of such corporation shall be deemed increased to the number therein stated, and the persons so named in such certificate shall be trustees until a new election of trustees shall be had, according to the said act, and the by-laws or regulations of such corporation. And in the case of the reducing of the number of trustees, the number stated in such certificate as the number of trustees which shall manage the business of such corporation, shall be deemed the number of trustees of such corporation to be elected, according to said act, and the by-laws and regulations of such corporation, at the next election and thereafter, after the filing of such certificate and duplicate or transcript; and in case a vacancy or vacancies shall occur in the board of trustees of such corporation, by resignation or otherwise, after the filing of such certificate and duplicate or transcript reducing the number of trustees after such filing, no election shall be had in the meantime to fill such vacancy

or vacancies while the number of trustees remaining shall equal or exceed the number to which the trustees are reduced in such certificate.

SEC. 2. This act shall take effect immediately.

STATE OF NEW YORK, *Office of Secretary of State,* } ss:

I have compared the preceding copy of laws, chapter 40, Laws of 1848, being "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes;" also acts in addition thereto amending and extending said act, with the original laws on file in this office; and I do herby certify that the same are correct transcripts therefrom and the whole of said original laws.

412

Witness my hand and the seal of office of the secretary of state, at the city of Albany, this 30th day of November, A. D. 1878.

[SEAL.] GEO. MOSS,
Deputy Secretary of State.

Certificate.

STATE OF COLORADO, *Secretary's Office,* } ss:

I, N. H. Meldrum, secretary of state of the State of Colorado, do certify that the annexed and foregoing is a full, true, and correct transcript of the certified copy of the laws of the State of New York, chapter 40, Laws of 1848, being "An act to authorize the formation of corporation- for manufacturing, mining, mechanical, or chemical purposes;" also acts in addition thereto amending and extending said act, which was filed in my office on the seventh day of December, A. D. 1878, at nine o'clock a. m., by the Crooke Mining and Smelting Company.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State, at the city of Denver, this fifteenth day of April, A. D. 1882.

N. H. MELDRUM,
Secretary of State.

413 Endorsed as follows:

100. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Plaintiff's Exhibit D. Filed Aug. 12, '82. E. D. Bouton, clerk.

414 *Mining Deed.*

This indenture, made the 18th day of November, in the year of our Lord one thousand eight hundred and seventy-eight between John Doherty of the county of —— and State of Colorado party of of the first part and Joseph R. Simons, of the county of Hinsdale and State of Colorado, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of

one hundred dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, that certain lode or mining claim known as the Annie lode or mine, the same being fifteen hundred feet in length and three hundred feet in width along the vein of said lode. Said lode situate, lying and being in Galena mining district in the county of Hinsdale and State of Colorado, and more particularly prescribed as follows, beginning at the southeast corner of said claim, at a post marked No. 1, running thence N. 34° 20′ E. 750 feet east center post, 1,500 N. E. cor. No. 2, N. 55° 40′ W. 300 feet N. W. cor. No. 3, S. 34° 20′ W. 750 feet W. center post, 1,500 feet S. W. cor. No. 4, S. 55° 40′ E. 300 feet S. E. corner place of beginning, from cor. No. 2. cor. No. 11 of survey 148 Ute lode bears 14° 30′ W. 109 feet. Also from cor.
415 No. 2 a stump 15 in. bears S. 48° E. 10 feet. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and, also, all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written,

JOHN DOHERTY. [SEAL.]

Signed, sealed, and delivered in presence of—

———.

STATE OF COLORADO,
County of Hinsdale, } *ss:*

I, O. D. Downtain, county clerk in and for said county, in the State aforesaid, do hereby certify that John Doherty, personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowl-
416 edged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal this 18th day of November, A. D. 1878.

[OFFICIAL SEAL.]

O. D. DOWNTAIN,
County Clerk.

Endorsed as follows:

No. 6618. Mining deed. John Doherty to Joseph R. Simons. State of Colorado, county of Hinsdale. I hereby certify that this deed was filed for record at 11 o'clock a. m., November 18th, 1878, in my office, and duly recorded in Book 7, page No. 33. O. D. Downtain, recorder. Fees, $2.25; ack., 50; $2.75, ch.

Further endorsed as follows:

101. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Plaintiff's Exhibit E. Filed Aug. 12, '82. E. D. Bouton, clerk.

417 *Mining Deed.*

This indenture, made the 28th day of February, in the year of our Lord one thousand eight hundred and seventy-nine, between Joseph R. Simons, of the county of Hinsdale and State of Colorado, party of the first part; and George L. Doherty, of the county of Hinsdale and State of Colorado, party of the second part, witnesseth. That the party of the first part, for and in consideration of the sum of five hundred dollars lawful — of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, released, remised, and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all that certain tract of land and lode claim known as the Annie lode, situated in Galena mining district, county of Hinsdale and State of Colorado, known and described as follows, to wit: Beginning at the southeast corner of said claim, at a post marked No. 1, running thence N. 34° 20′ E. 750 feet E. center post, 1,500 feet northeast corner, No. 2, N. *N.* 55° 40′ W. 300 feet, N. W. corner, N. 3, S. 34° 20′ W. 750 feet W. center post, 1,500 feet S. W. corner, No. 4, S. 55° 40′ E. 300 feet S. E. corner place of beginning. From cor. No. 2, No. 11 of survey No. 148, Ute lode, bears north 14° 30′ W. 109 feet; also from corner No. 2 a stump 15 inches bears S. 48° E. 10 feet. 150 feet of said lode being southwesterly of discovery shaft on said lode, and 1,350 feet northeasterly of said discovery shaft.

418 Said lode being 1,500 feet linear and horizontal measure, in length, and 300 feet in width along the vein thereof. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and, also, all *the* singular, the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof and, also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances; to have and to hold, all and singular, the said prem-

ises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOSEPH R. SIMONS.

Signed, sealed, and delivered in presence of—
BURT H. CALKINS.
THOMAS C. DOHERTY.

STATE OF COLORADO, } *ss:*
County of Hinsdale, }

I, Henry C. Olney, a notary public in and for said county, in the State aforesaid, do hereby certify that Joseph R. Simons, personally known to me to be the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instru-
419 ment of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notorial seal this 28th day of February, A. D. 1879.

[SEAL.] HENRY C. OLNEY,
Notary Public.

Endorsed as follows:

No. 6820. Mining deed. Joseph R. Simons to George L. Doherty. State of Colorado, county of Hinsdale, *ss:* I hereby certify that this deed was filed for record in my office at 9.10 o'clock a. m., M'ch 3rd, 1879, and is duly recorded in Book 7, page No. 48. O. D. Downtain, clerk and recorder. Fees, $2.50, paid M'ch 6th, 1879.

Further endorsed as follows:

102. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Plaintiff's Exhibit F. Filed Aug. 12, 1882. E. D. Bouton, clerk.

420 *Mining Deed.*

This indenture, made the first day of May, in the year of our Lord, one thousand eight hundred and seventy-nine between George L. Doherty, of the county of Hinsdale and State of Colorado, party of the first part, and the Crooke Mining and Smelting Company a corporation organized under the laws of the State of New York and doing business in the State of Colorado of the county of —— and State of Colorado, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of three thousand five hundred dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever

quitclaim, unto the said party of the second part, and to its successors and assigns, the following-described mining property, lying and being situated in Galena mining district, in the county of Hinsdale, and State of Colorado, to wit: That certain silver-bearing lode known and located as the Annie lode or mine, said lode adjoining the Ute and Ulè lodes, and more particularly described in the location certificate thereof, recorded in Record No. 2, page 619, of the records of said county of Hinsdale. Said lode was located on the 12th day of October, A. D. 1878, by John Doherty. Also that certain mill site located on the 25th day of April A. D. 1879
by George L. Doherty, in connection with the said Annie
421 lode. The location certificate of said mill site being recorded
in Record No. 3, page No. 32 of the records of said county of Hinsdale, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and, also, all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the said premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

In witness whereof, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

GEO. L. DOHERTY. [SEAL.]

Signed, sealed, and delivered in presence *thereof*—

—— ——.

STATE OF COLORADO, }
County of Hinsdale, } *ss:*

I, Hugh J. Alexander, in and for said county, in the State aforesaid, do hereby certify that George L. Doherty, personally known to me as the person whose name is subscribed to the annexed deed,
appeared before me this day in person and acknowledged
422 that he signed, sealed, and delivered the said instrument of
writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notorial seal this first day of May, A. D. 1879.

[SEAL.] HUGH J. ALEXANDER,
Notary Public.

Endorsed as follows:

No. 6909. Mining deed. George L. Doherty to Crooke Mining & Smelting Co. State of Colorado, county of Hinsdale, *ss.* I hereby

certify that this deed was filed for record at 9.40 o'clock a. m., May 3rd, 1879, in my office and duly recorded in Book 7, page No. 56. O. D. Downtain, recorder; C. B. Hickman, deputy. Fees, $2.25. M. B. Geary, attorney-at-law. Chg. Crooke Mining & Smelting Co. (Official seal.)

Further endorsed as follows:

103. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Plaintiff's Exhibit G. Filed Aug. 12, 1882. E. D. Bouton, clerk.

423 I, Henry C. Olney, register of the United States land office at Lake City, Colorado, do hereby certify that A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, by J. W. Mills, attorney-in-fact, did, on the eighteenth day of October, A. D. 1879, file their application in this office for a United States patent to the Monitor Lode mining claim, and that in said application and field-notes said monitor lode is described as follows, to wit:

Survey No. 282, district No. 7.

At the southeat corner of said claim I set a post 4 x 4 and 4 feet long in ground 2 feet, surrounded by large mound of stones and marked 1 x 282 for corner to No. 1, beginning.

Thence N. 48° 8′ E. 112 feet, Lake City and Uncompahgre toll road, bearing S. 42° E. 593.4 feet corner No. 7 of survey No. 147 A, Ulè lode owned by Lewis Crooke bearing S. 68° 56′ W. 616.4 ft. Corner No. 2, post 4 x 4 x 4 ft. long in ground 2 feet, surrounded by mound of stones and marked 2 x 282.

Thence N. 60° 27′ E. 158.2 feet, corner No. 6, survey No. 147 A, bears S. 52° 49′ W. 408.5 feet, a rock in place marked 3 x 282 for corner No. 3.

Thence N. 13° 25′ E. 52.38 feet, course No. 6, survey No. 147 A, 341.5 feet, corner No. 4, post 4 x 4 inches 4 feet long in ground 2 feet, surrounded by mound of stones and marked 4—282.

Thence N. 41° 31′ W. 300 feet, corner No. 5, set post 4 x 4 inches 4 feet long in ground 2 feet, surrounded by mound of stones and marked 5—282.

424 Thence S. 13° 25′ W. 341.5 feet set post 4 x 4 inches 4 feet long in ground 2 feet, surrounded by mound of stones and marked 7—282 for corner No. 7.

Thence S. 48° 8′ W. 590 feet, Lake City and Uncompahgre toll road, bearing S. 42° E. 616.4 feet a rock in place marked 8—282 for corner No. 8.

From corner No. 8 I run S. 41° 31′ E. 128.2 feet course No. 9, 147 A, bearing S. 51° 35′ W. 300 feet corner No. 1 beginning.

Variation, 13° 30′ to 14° 10′ E.

Contents of claim, 7.4 acres, after deducting 1.55 acres included in survey No. 147 A.

From corner No. 1 the corner of sections 35 & 36, on the S. line of t'p 44 N., R. 5 W., bears S. 22° 13′ E. 2,877 feet.

From corner No. 5 a shaft 7 x 10 x 20 feet deep, bears S. 33° 40′ E. 148 feet.

This shaft was sunk by claimants of Annie lode (located Oct. 12th, 1878), who intended to start a drift from the bottom to prospect for the Ute extension.

From corner No. 6 a shaft 5 x 16 x 12 ft. deep sunk by claimants of Electric lode, located May 19th, 1879, bears S. 46 W. 95 ft.; a shaft 5 x 6 11 feet bears S. 41° E. 180 feet (sunk by claimants of Enterprise lode, located May 19th, 1879); the summit of Red mountain bears S. 33° 45′ E., and the summit of another prominent peak bears S. 44° 15′ W.

From corner No. 8 a shaft 6 x 7 and 18 feet deep sunk by claimants of Annie lode aforesaid bears N. 78° E. 290 feet, and corner No. 10 of survey 147 A bears south 16° 14′ 30″ W. 221.3 feet.

From corner No. 4, corner No. 1 of the Ute lode survey
425 No. 148 (Lewis Crooke, claimant), bears S. 41 31 E. 10 feet.

From corner No. 8 U. S. L. M., 115 (of the series established by J. W. & J. J. Abbott), bears N. 48 42 30 W. 420 feet.

(Signed) J. J. ABBOTT,
U. S. Deputy Mineral Surveyor.

Subscribed by said J. J. Abbott, U. S. deputy mineral surveyor, and sworn to before me this 25th day of July, 1879.

(Signed) HENRY C. OLNEY,
Notary Public. [SEAL.]

(Signed) WM. L. CAMPBELL,
U. S. Surveyor Gen'l of Colorado.

U. S. surveyor gen'l's office, Denver, Colorado, August 9th, 1879.
HENRY C. OLNEY,
Register Land Office.

Land Office, Lake City, Colo., April 12, 1882.

Endorsed as follows:

104. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Plaintiff's Exhibit H. Filed Aug. 12, 1882. E. D. Bouton, clerk.

426 I, Henry C. Olney, register of the United States land office at Lake City, Colorado, do hereby certify that the Crooke Mining and Smelting Company did, on the twenty-second day of December, A. D. 1879, file its adverse claim and protest against the issuance of an United States patent to the Monitor lode, and did on said day file in the said adverse — a plat and field-notes of the Annie Lode mining claim, showing the area in conflict between the said Annie and Monitor lodes, and that said area in conflict in said protest is described as follows, to wit: Beginning at the northwest corner No. 5 of the Monitor claim (survey No. 282) and running thence S. 13° 25′ W. 341.5 feet, thence S. 60° 27′ W. 408.5 feet, thence S. 48° 08′ W. 463.5 feet, thence S. 34° 20′ W. 99.6 feet, thence S. 55° 40′ E. 112.8 feet to the west side line of Ulè lode, thence N. 51° 35′

E. 91.6 feet to corner No. 9 of Ulè lode, thence N. 69° 40′ E. 237 feet to corner No 8 of Ulè lode, thence N. 68° 56′ E. 40.8 feet, thence N. 34° 20′ E. 887.1 feet to the northeast line of said Monitor lode, thence N. 41° 31′ W. 135.1 feet to the place of beginning.

(Signed) JOHN J. CROOKE.

Sworn and subscribed to before me this 18th day of December, A. D. 1879.

(Signed) FRED. C. PECK,
Notary Public.

HENRY C. OLNEY,
Register Land Office.

Land office, Lake City, Colo., April 12, 1882.

Endorsed as follows:

105. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Plaintiff's Exhibit I. Filed Aug. 12. 1882. E. D. Bouton, clerk.

427 No. 181.

Location Ctf. Monitor Lode.

Know all men by these presents that C. F. McConkey & Wm. Phillips, of the county of Hinsdale and Territory of Colorado, claim by right of discovery and location fifteen hundred feet linear and horizontal measurement on the Monitor lode along the vein thereof, with all its dips, variations, and angles, together with one hundred feet in width on each side of the middle of said vein at the surface, and all veins, lodes, ledges, and surface ground within the lines of said claim seven hundred and fifty feet on said lode, running southwest from center of discovery shaft, and seven hundred and fifty feet running northeast from said center of discovery shaft, said discovery shaft being situated upon said lode within the lines of said claim in Lake mining district, county of Hinsdale and Territory of Colorado. Located on Henson creek 150 feet west of the Ulè lode and near the Ute lode. C. F. McConkey claims a ¾ interest in the above lode and Wm. Phillips a ¼ interest. Said Monitor lode was located on the 20th day of June, A. D. 1875, date of certificate June 28th, 1875.

C. F. McCONKEY.
WM. PHILLIPS.

Filed for record June 28th, 1875. Wm. H. Green, recorder. Transcribed from page No. 276, Book A, and from page 16, Book B.

STATE OF COLORADO, }
County of Hinsdale, } *ss:*

I, J. C. Bell, county clerk and recorder in and for said county, in the State aforesaid, do hereby certify the foregoing to be a
428 true, full, and correct copy of an original in my office, being location certificate (No. 181, in the series of my office) of the

Monitor lode, and the date of the filing of the same for record as the same appear of record on page 53 of Lode Book No. One (1) in my office.

Given under my hand and official seal this 19th day of August, 1881.

J. C. BELL,
County Clerk and Recorder,
By THOMAS SHARLY, *Deputy.*

Endorsed as follows:

Monitor Location Cirt. Book 1, p. 53. Certified copy. 108. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Defendants' Exhibit 3. Filed Aug. 12, 1882. E. D. Bouton, clerk.

429 No. 3985. Location certificate Monitor lode. Filed for record this 6th day of Aug., 1877, at 1.10 o'clock a. m.. O. D. Downtain, recorder.

STATE OF COLORADO, } *ss:*
Hinsdale County, }

Know all men by these presents that we, the undersigned, assignees of C. F. McConkey & Wm. Phillips, the original locators and now owners of the Monitor lode, situated in Galena district, formerly Lake, in said county, apprehending that the original certificate of said lode which is recorded in the office of the recorder of said county, in Book 1 of Lode Records, on page 53, may have been defective and having now had made an accurate survey of said lode, hereby make, file, and cause to be recorded in the office of said recorder this additional location certificate of said lode, the boundaries whereof are as follows, to wit: Commencing at the southeast corner of said claim, at a post marked No. 1, & running thence (1) north 48° 8′ east 616.4 feet to corner No. 2; (2) north 60° 27′ east 408.5 feet; (3) north 13° 25′ east 341.5 feet to corner No. 3; (4) north 41° 31′ west 300 feet to corner No. 4; (5) south 13° 25′ west 341.5 feet; (6) south 60° 27′ west 408.5 feet to corner No. 5; (7) south 48° 8′ west 616.4 feet to corner No. 6; (8) south 41° 31′ east 300 feet to the place of beginning. Said corners are each marked by a substantial post. From corner No. 3 corner No. 1 of the Ute lode bears south 41° 31′ E. 10 feet and a spruce tree 24 inches in diameter, plainly blazed, bears south 41° 31′ E. 35 feet. From

430 corner No. 4 corner No. 6 of the Ute lode bears south 41° 31′ E. 10 feet. From corner No. 5 a spruce tree 12 inches in diameter, plainly blazed, bears south 41° 31′ east 22 feet. This lode is situated on the north side of Henson creek about 3½ miles above Lake City, and is the southwest extension of the Ute lode. Corner No. 6 is situated on a point of rocks just above the Lake City and Uncompaghre toll road, about — feet from the center thereof and about 400 feet below where the stream following down Ute gulch crosses said road. Said Monitor lode was originally located June 20th, 1875, the certificate thereof being dated and recorded June 28th, 1875. The location stake and discovery shaft of

said Monitor lode are within said boundaries. This lode runs lengthwise through the center of said boundaries as near as we can judge, and we claim all veins, lodes, ledges, and surface ground and all spurs, dips, and angles of such Monitor lode within the lines of said claim. Dated July 31st, 1877.

Attest:

A. R. BUSHNELL. A. NATHAN.
JOHN G. CLARK. JOE NATHAN.
JOSEPH BOCK. JOHN SCHRINER.
FRED. J. MILLER.

STATE OF COLORADO, }
County of Hinsdale, } *ss:*

I, J. C. Bell, county clerk and recorder in and for said county, in the State aforesaid, do hereby certify the foregoing to be a full, true, and correct copy of the additional location certificate of the Monitor lode No. 3985, Book 2, page 324, as the same appears on record in the books of my office now in my custody.

Given under my hand and official seal this 30th day of July, 1881.

J. C. BELL, *County Clerk and Recorder.*
By THOMAS SHARLY, *Deputy.* [SEAL.]

431 Endorsed as follows:

Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Monitor additional location cert. Rec. Aug. 6, 1877. (Certified copy.)

109. 215. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* District court. Defendants' Exhibit 4. Filed Aug. 12, 1882. E. D. Bouton, clerk.

432 *Quitclaim Deed.*

This deed, made this twenty-second (22) day of November, in the year of our Lord one thousand eight hundred and seventy-five, between Wm. F. Phillips, of the county of Hinsdale and Territory of Colorado, of the first part, and Charles McConkey of the county of Hinsdale and Territory of Colorado, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of twenty-five dollars and other valuable considerations $\frac{}{100}$ dollars, to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed and quitclaimed, and by these presents do remise, release, sell, convey and quitclaim unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, claim and demand which the said party of the first part has in and to the following-described mining property, situated, lying and being in the county of Hinsdale and Territory of Colorado, to wit: An undivided one-half ($\frac{1}{2}$) interest in the El Paso lode, situated, lying and being in Fork gulch opposite Park gulch one mile west from Big Casino on the north side of Godman creek. Also a one undivided one-fourth ($\frac{1}{4}$)

interest in the Monitor lode, situated five miles west of Lake City on the north side of Henson (or Godman) creek, known as the extension of the Ute one-half mile north of the forks of Godman (or Henson) creek. All of the above-described mining property being in Lake mining district, Hinsdale county, Territory of Col-
433 orado. To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title, interest and claim whatsoever, of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

W. F. PHILLIPS. [SEAL.]

Signed, sealed, and delivered in presence of—
A. R. THOMPSON.

TERRITORY OF COLORADO, } ss:
County of Hinsdale, }

I, A. R. Thompson, probate judge in and for said county, in the State aforesaid, do hereby certify that Wm. Phillips, who is personally known to me to be the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal this 22nd day of November, A. D. 1875.

ALBER R. THOMPSON, *P. J.* [SEAL.]

STATE OF COLORADO, } ss:
County of Hinsdale, }

I, J. C. Bell, county clerk and recorder in and for said county, in the State aforesaid, do hereby certify the foregoing to be a
434 correct copy of the deed, W. F. Phillips to Charles McConkey, page 184 of Deed Record (1), as the same appears of record in the books of my office; and I further certify that the foregoing is a full, true, and correct copy of the original in my custody.

Given under my hand and official seal this 8th day of April, 1882.

THOMAS SHARLY,
Clerk and Recorder.
[SEAL.]

Endorsed as follows:

No. 712. Quitclaim deed. Wm. F. Phillips to Charles McConkey. Transcribed from page 269, Book No. 1. I hereby certify that this deed was filed for record at 3 o'clock p. m. Nov. 22nd, 1875, 188-, in my office, and duly recorded in Book (1), page No. —. William H.

Green, recorder, by Joel N. Angier, deputy. Fees, $—. 110. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Defendants' Exhibit 5. Filed Aug. 12, 1882. E. D. Bouton, clerk.

435 *Warranty Deed.*

This deed, made this twelfth day of February in the year of our Lord one thousand eight hundred and seventy-seven, between Charles F. McConkey, of the county of Hinsdale and State of Colorado, of the first part, and John G. Clark, of the county of Grant and State of Wisconsin of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one thousand five hundred dollars, to the said party of the first part, in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained sold and conveyed, and by these presents do grant, bargain, sell, convey and confirm unto the said party of the first part, his heirs and assigns forever, all the following-described lot or parcel of land, situate, lying and being in the county of Hinsdale and State of Colorado, to wit: An undivided one-half (½) interest in a certain mineral-bearing vein or lode known as the Monitor lode. Said lode being situate and lying about four (4) miles west of the town of Lake City on the north side of Henson creek on Ute mountain (so called) and is known as the extension of the Ute lode in Lake mining district county and State aforesaid. Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever, of the said part- of the first part, either in law or equity, of, in and
436 to the above-described premises with the hereditaments and appurtenances; to have and to hold the said premises above bargained and described, with the appurtenances, unto the said part- of the second part, heirs and assigns forever. And the said part- of the first part, for heirs, executors and administrators, do covenant, grant, bargain, and agree to and with the said part- of the second part, heirs and assigns, that at the time of the ensealing and delivery of these presents, — will *siezed* of the premises above conveyed as of good, sure, perfect, absolute and indefeasible estate of inheritance, in law, in fee simple, and ha- good right, full power and lawful authority to grant, bargain, sell and convey the same, in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of whatever kind and nature soever; and the above-bargained premises, in quiet and peac-able possession of the said part- of the second part, heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said part- of the first part, shall and will warrant and forever defend, except as to the claim of the United States.

In witness whereof, the said part- of the first part ha- hereunto set — hand and seal the day and year above written.

CHARLES F. McCONKEY. [SEAL.]

Signed, sealed, and delivered in presence of—
L. C. McKENNEY.
HUGH J. ALEXANDER.

STATE OF COLORADO, } *ss:*
County of Hinsdale, }

437 I, O. D. Downtain, county clerk and recorder in and for said county, in the State aforesaid, do hereby certify that Charles F. McConkey, personally known to me to be the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal this 12th day of February, A. D. 1877.

O. D. DOWNTAIN,
Clerk and Recorder.
JNO. H. WERKHEISER, *Deputy.*

Endorsed as follows:

½ No. 3014. Warranty deed. ½ Monitor. Charles F. McConkey to John G. Clark. February 12, 1877. State of Colorado, county of Hinsdale, *ss:* This warranty deed was filed for record at 11.35 o'clock a. m., February 12th, 1877, and duly recorded in Book 3, page No. 15. O. D. Downtain, recorder, by Jno. H. Werkheiser, deputy. No. —. Fees, $2.25, paid. 111. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Defendants' Exhibit 6. Filed Aug. 12, 1882. E. D. Bouton, clerk.

438 *Warranty Deed.*

This deed made this nineteenth day of March in the year of our Lord one thousand eight hundred and seventy-seven, between Charles F. McConkey, of the county of Hinsdale and State of Colorado, of the first part, and Jno. G. Clark, of the county of Grant and State of Wisconsin, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of two hundred dollars, to the said party of the first part, in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all the following-described lot or parcel of land, situate, lying and being in the county of Hinsdale and State of Colorado, to wit: An undivided one-fourth interest in the Monitor lode, situated in Lake mining district, Hinsdale county. Also, the entire right to the cabin on the surface ground of the said

Monitor lode. Also, all claim for proceeds of one-half of said Monitor mine, growing out of a previous sale to said party of the first part. Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim and demand whatsoever, of the said party of the first part, either in law or equity, of, in and to the above-bargained
439 premises, with the hereditaments and appurtenances:

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the said Charles F. McConkey, part- of the first part, for his heirs, executors and administrators, does covenant, bargain and agree, to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents, he was well seized of the premises above conveyed, as of good, sure, perfect, absolute and indefeasible estate of inheritance, in law, in fee simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same, in manner and form as aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of whatever kind and nature soever; and the above-bargained premises, in quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend, except as against the United States.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year above written.

CHAS. F. McCONKEY. [SEAL.]

Signed, sealed and delivered in presence of—
L. C. McKENNEY.
JNO. H. WERKHEISER.

STATE OF COLORADO, }
County of Hinsdale, } *ss:*

440 I, O. D. Downtain, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that Charles F. McConkey, personally known to me to be the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal this 19th day of March, A. D. 1877.

O. D. DOWNTAIN,
Clerk and Recorder,
By JNO. H. WERKHEISER,
Deputy. [SEAL.]

Endorsed as follows:

¼ No. 3169. Warranty deed. ¼ Monitor. Charles F. McConkey to John G. Clark. State of Colorado, county of Hinsdale, *ss:* This warranty deed was filed for record at 2.20 o'clock p. m., March 19th, 1877, and duly recorded in Book 3, page No. 49. O. D. Downtain, recorder, by Jno. H. Werkheiser. No. —. Fees, $2.25, paid.

112. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Defendants' Exhibit 7. Filed Aug. 12, 1882. E. D. Bouton, clerk.

441 *Mining Deed, Colorado.*

This indenture, made the 10th day of November in the year of our Lord one thousand eight hundred and seventy-six between C. F. McConkey, of the county of Hinsdale and State of Colorado, party of the first part, and Fred. J. Miller of the county of Hinsdale and State of Colorado, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of five hundred dollars, of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, one undivided one-fourth (¼) part or interest in and to the following-described mining property, to wit: The Monitor lode, situated in Lake mining district, county of Hinsdale and State of Colorado, known as the southern extension of the Ute lode, four miles west of Lake City on the north side of Henson creek, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof;

442 and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, together with the appurtenances and privileges thereto incident unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

CHAS. F. McCONKEY. [SEAL.]

Signed, sealed, and delivered in presence of—

—— ——.

STATE OF COLORADO, }
County of Hinsdale, } *ss:*

I, Clark L. Peyton, notary public in and for said county, in the State aforesaid, do hereby certify that Chas. F. McConkey, personally

known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth. Given under my hand and notarial seal this 11th day of November, A. D. 1876.

CLARK L. PEYTON, [SEAL.]
Notary Public.

STATE OF COLORADO, }
County of Hinsdale, } *ss:*

I, Thomas Sharly, county clerk and recorder in and for said county, in the State aforesaid, do hereby certify the foregoing to be a correct copy of the deed, Chas. McConkey to Fred. J. Miller, as the same appears of record in Book 2, page 397, in my office.

443 Given under my hand and official seal this 8th day of April, A. D. 1882.

THOMAS SHARLY,
Clerk and Recorder.

Endorsed as follows:

2615. Mining deed. Chas. F. McConkey to Fred. J. Miller. State of Colorado, county of ——, *ss:* I hereby certify that this deed was filed for record at 12 m., November 11th, 1876, in my office, and duly recorded in Book 2, page 397. O. D. Downtain, recorder.

115. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Defendants' Exhibit 10. Filed Aug. 12, 1882. E. D. Bouton, clerk.

444 *Warranty Deed.*

Know all men by these presents, that we, John G. Clark and Minerva his wife, of the county of Grant and State of Wisconsin, in consideration of ten dollars, paid by Adolphus Nathan, Joseph Nathan, John Schreiner, Joseph Bock and A. A. Bushnell, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Adolphus Nathan, Joseph Nathan, John Schreiner, Joseph Bock and A. R. Bushnell, the following-described premises and real estate, lying and being in the county of Hinsdale and State of Colorado, to wit: The undivided five-sixths ($\frac{5}{6}$) of the undivided three-fourths ($\frac{3}{4}$) of a certain mineral-bearing lode known as the Monitor lode, the same being situated and lying about four miles west of the town of Lake City on the north side of Henson creek on Ute mountain (so called), and known as the extension of the Ute lode in Lake mining district, county and State aforesaid, also the undivided five-sixths ($\frac{5}{6}$) of the cabin thereon or near thereto, deed- to said Clark by Chas. F. McConkey, to have and to hold, the above-granted premises, to the said Adolphus Nathan, Joseph Nathan, John Schreiner, Joseph Bock and A. R. Bushnell, their heirs and assigns, to their use and behoof forever; and I, the said John G. Clark, for myself, my heirs, executors and administrators, do covenant with the said grantees,

their heirs and assigns, that I am lawfully seized, in fee simple of the aforesaid premises, that they are free from all incumbrances except the interest of the United States therein. That I have
445 good right to sell and convey the same to the said grantees their heirs and assigns forever, as aforesaid, and that I will, and my heirs, executors and administrators shall warrant and defend the same to the said grantees, their heirs and assigns forever, against the lawful claims and demands of all persons as to any claiming by, through or under me.

In witness whereof, the said John G. Clark and Minerva his wife have hereunto set their hands and seals this 19th day of April, in the year of our Lord eighteen hundred and seventy-seven.

JOHN G. CLARK. [SEAL.]
MINERVA A. CLARK. [SEAL.]

Signed, sealed and delivered in presence of—
H. BUCHNER.
MATT. BIRCHARD.

STATE OF WISCONSIN, } *ss*
County of Grant, }

I, Herman Buchner, the clerk of the circuit court, a court of record in and for said county, do hereby certify that on the 19th day of April, A. D. 1877, personally came before me the within-named John G. Clark and Minerva, his wife, to me known to be the persons who executed the foregoing deed, and acknowledged the same to be theirs and each of their free act and deed for the uses and purposes therein mentioned.

HERMAN BUCHNER, [SEAL.]
Clerk Circuit Court Grant Co., State of Wisconsin.

Endorsed as follows:
$\frac{5}{6}$ of $\frac{3}{4}$. No. 3609. Warranty deed, $\frac{5}{8}$ Monitor, from John G. Clark and wife to Adolphus Nathan *et al.* Date,
446 April 19th, 1877. Registry of deeds, Hinsdale county, *ss*: Received for record June 4th, A. D. 1877, at 3.45 o'clock p. m., and recorded in Book 5 of Deeds, on page 11. O. D. Downtain, register, by Jno. H. Werkheiser, deputy. Fees, $2.25, paid. 113. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Defendants' Exhibit 8. Filed Aug. 12, 1882. E. D. Bouton, clerk.

447 *Quitclaim Deed.*

Joseph Bock to A. A. Bock. } 7058.

Filed for record June 28th, A. D. 1879, at 5 o'clock p. m.
O. D. DOWNTAIN, *Recorder.*

Book 6, page 357.

This indenture, made this 28th day of June, A. D. 1879, witnesseth that I, Joseph Bock, in consideration of one dollar to me in

hand paid by A. A. Bock, do hereby sell and convey by quitclaim deed unto said A. A. Bock all my right, title, and interest in and to a certain mining claim or lode known as the Monitor lode, situated in Hinsdale county, State of Colorado, Galena mining district, about 3 & ½ miles above Lake City, and said lode particularly described as per location certificate recorded in Book 1 of Lode Records on page 53, and as per amended location certificate recorded in Book 2 of Lode Records on pages 324 & 325 in recorder's office of said Hinsdale county. To have and to hold all my right and title in and to said Monitor lode, above described to the said A. A. Bock, her heirs and assigns forever.

Dated Lake City, Colorado, this 28th day of June, 1879.

JOSEPH BOCK. [SEAL.]

Witness:
E. D. BOUTON.

STATE OF COLORADO, } ss:
Hinsdale County, }

On this 28th day of June, 1879, personally came before me Joseph Bock, the grantor herein, to me personally known, and acknowledged the execution of above conveyance as his free act and deed for the uses and purposes therein mentioned.

Witness my hand and seal of office, at Lake City, Colo., this 28th day of June, 1879.

CHAS. W. ADAMS,
448 [SEAL.] *Clerk of the District Court in and for said County,*
By E. D. BOUTON,
Deputy Clerk.

STATE OF COLORADO, } ss:
County of Hinsdale, }

I, Thomas Sharly, county clerk and recorder in and for said county, do hereby certify that the foregoing is a true copy of a deed from Joseph Bock to A. A. Bock as the same appears on record on page 357 of Book 6, in my office.

Given under my hand and official seal this 8th day of April, 1882.

THOMAS SHARLY,
Clerk and Recorder. [SEAL.]

Endorsed as follows:

114. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Defendants' Exhibit 9. Filed Aug. 12, 1882. E. D. Bouton, clerk.

449 Which map was endorsed as follows:

John J. Crooke testified that the pl'ff company had sold out to the Crooke M. & S. Co., Limited, an English Co.; that this map was gotten up by one of their experts; that he is about ⅓ owner in the new Co. It purports to show the situation of their properties and should have been admitted when offered by def'ts; have its offer and rejection appear in the record and exception.

Further endorsed as follows:

135. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Map of property of Crooke M. & S. Co., Limited. Filed Nov. 20, 1882. E. D. Bouton, clerk.

And thereupon the court, at the plaintiff's request, instructed the jury as follows:

450 *Plaintiff'- Instruction No.* 7.

The court instructs the jury that the plaintiff has properly established the discovery of the lode called the Annie and the location of the claim called the Annie claim—that is, the plaintiff has made out a *prima facie* right to the lode and claim, and unless the defendants have established by evidence a prior or better legal right to that part of the Annie and Monitor claims in dispute than did the plaintiff in the first instance, the plaintiff must recover.

Given.

BURRIS, *Judge.*

Excepted to August 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

Plaintiff's Instruction No. 8.

Under the acts of Congress and the laws of the State a locator is allowed to take up fifteen hundred feet along the course of his vein and one hundred and fifty feet of surface ground on each side of the centre of his vein. The period of ninety days is given to the discoverer in which to prospect and discover the course of his lode; this may sometimes be determined by outcroppings on the surface, and sometimes it is necessary to sink pits or other workings to determine the true locality of the lode; in any event the law contemplates within the ninety days the course of the vein will be discovered and the location be made with reference to its course. The discoverer, when his location is complete, has the right to the enjoyment and possession of all veins or lodes within his boundary lines when their tops or apexes are within these lines, but this right to the
451 enjoyment and possession of other lodes than the one located depends upon their being within one hundred and fifty feet of the centre of his located vein and the located vein must not have departed from the side lines in its course. If it does the locator has no right to other lodes which are formed within his claim beyond the point at which the located vein departs from his side lines, even though they may be nearer than 150 feet to the vein after it leaves the side lines. In other words, the right of possession and enjoyment of other lodes than the one located and discovered depends upon their being found at a distance of 150 feet or less from the centre of the vein discovered and located and upon the located vein being within the side lines of the claim as located.

Given.

BURRIS, *Judge.*

Excepted to August 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

Plaintiff's Instructions No. 9.

The defendants claim the ground in dispute by virtue of a prior location of the Monitor claim. Evidence has been introduced tending to show such a location and it is for you to determine from that evidence what is the fact. After the question of location is determined the principal point in controversy is upon what vein was the Monitor claim located or what is the course of the said vein. The defendants allege and seek to prove that the location was made upon a vein which runs from the discovery shaft of the Monitor across and towards the vein upon which the Annie claim was
452 located, while the plaintiff asserts and seeks to prove that the location was made upon a vein which runs from the Monitor shaft down and nearly parallel with the Annie lode and which empties into or connects with the Ulè lode. This is the principal point in controversy and to determine which claim is best supported by testimony and reason is the province and duty of the jury. If the jury should believe from the testimony that the Monitor vein runs from the discovery shaft into the Ulè vein, as claimed by plaintiff and as shown upon the accepted plat of the various claims, then the verdict of the jury should be for the plaintiff.

Given.

BURRIS, *Judge.*

Excepted to August 12th, 1882, by def'ts.

J. W. MILLS, *Their Att'y.*

Plaintiff's Instructions No. 10.

In determining which is the true Monitor vein the vein the original locators had in mind when the location was made may aid the jury if from the evidence the jury can reasonably determine which vein that was. It is a fair presumption that when McConkey and Phillips completed their location that they had determined the true or approximate course of the vein they located and the location as described and staked may aid the jury in determining what that course was. If from the evidence the jury should believe that the original locators when the location certificate was made and filed had in view and intended to locate the vein claimed by the
453 plaintiff to be the Monitor vein that fact may be a strong reason for considering that the vein so intended to be located is, in fact, the Monitor vein.

Which instruction the court gave to the jury.

Excepted to August 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

Plaintiff's Instruction No. 11.

A discoverer cannot locate and claim two lodes by virtue of one discovery shaft. If the discovery shaft is sunk upon one lode and another lode intersects or crosses it, no matter at what angle, the location cannot be considered as being made upon the vein which crosses the one upon which the shaft is sunk, and it makes no difference what may be the relative richness or value of the two veins. If the location is properly made the locator may hold so much of the cross-vein as lies within one hundred and fifty feet of the course of the located vein upon each side thereof, but no more. It is the vein upon which the location is made that determines the right of the locator to the surface ground and the veins within it, and not the cross-vein, although the cross-vein might be richer and stronger than the one upon which the shaft was sunk.

Given.

BURRIS, *Judge.*

Excepted to August 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

Plaintiff's Instruction No. 12.

The distance between the Monitor vein, as it is claimed to exist by the plaintiff, and the Annie vein is at no point within the
454 limits of the Monitor or Annie claims less than 150 feet. It is proven by the plaintiff, and is not contradicted by the defendants, that the distance between said veins varies from 157 feet to upwards of 240 feet, and if you believe that the Monitor vein is in the place asserted by the plaintiff, then the distance between the two veins may be taken by the jury as above stated, and if you should so find your verdict will be for the plaintiff.

Given.

BURRIS, *Judge.*

Excepted to August 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

Plaintiff's Instruction No. 13.

If the jury should believe from the evidence that the vein which runs across from below the Monitor discovery shaft towards the vein upon which the Annie discovery shaft is sunk, and which defendants claim is a part of the Monitor vein, crosses and continues beyond the vein upon which the Monitor discovery shaft is sunk and into and beyond the Enterprise shaft, then that vein is not the Monitor vein and the location is not made upon it, and if the Annie vein is more than 150 feet distant from the true Monitor vein in its course through the several claims the defendants cannot recover.

Given.

BURRIS, *Judge.*

Excepted to August 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

Plaintiff's Instruction No. 14.

The fact that a vein cannot be seen or traced in all its course
455 upon or a short distance beneath the surface of the mountain does not destroy its character as a vein, nor does it give to a locator the right to take up and occupy some other vein because of its near proximity to the one which cannot be seen or traced in all its course. The law contemplates that but one vein shall be located upon, and the rights of the locator within his claim depends upon the particular vein located and no other.

Given.

BURRIS, *Judge.*

Excepted to August 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

Plaintiff's Instruction No. 15.

While the statute gives to locators and their grantees the right to file additional location certificates and to take in abandoned territory and change the lines of the original location, it confers no right to change from the vein upon which the first location was made. Once a vein has been discovered and located, that vein cannot be abandoned and another appropriated unless there should be a complete new location made and all the steps required for any location be taken anew and fully completed to confer any rights under the location upon a different lode than the original.

Given.

BURRIS, *Judge.*

Excepted to August 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

Plaintiff's Instruction No. 16.

I instruct the jury that the legislature of the State has passed a
456 law upon the subject of cross-veins and upon the subject of veins running into each other. While it declares that while one lode crosses, runs into, or unites with another the priority of record shall determine the rights of claimants, yet it also expressly provides that "in no case where it appears that two lodes cross one another shall the priority of record give any person the privilege of turning off from the crevice or lode which continues in the same direction of the main lode upon which he or they may have recorded their claim;" and it further expressly provides that such location shall at all times follow the crevice running nearest

in the general direction of the main lode upon which he or they may have recorded their claim or claims.

Given.

BURRIS, *Judge.*

Excepted to August 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

Endorsed as follows:

117. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Plaintiff's instructions. Filed Aug. 12, '82. E. D. Bouton, clerk.

457 *Instructions Asked by Defendants.*

District Court in and for Hinsdale County, Colorado.

THE CROOKE MINING AND SMELTING COMPANY, Pl't'ff,
vs.
A. R. BUSHNELL *et al.*, Defendants.

1st. The court charges you that the defendants have applied for a patent from the United States on what is claimed by them as the Monitor Lode mining claim, in Galena mining district, in this county. The plaintiff company have brought this action in ejectment in support of an adverse claim made and filed by it to a part thereof described in the complaint as lying within the boundaries of what is claimed by the plaintiff as the Annie lode. The defendants claim and have evidence to establish that the Monitor lode was duly located by Chas. F. McConkey and Wm. Phillips, from whom, through intermediate grantors, they derived their title on June 20th, 1875, and that their original location certificate of such location was duly recorded on June 28th, 1875. It is claimed by the plaintiff that the Annie lode was located on October 12th, 1878, and that the location certificate thereof was duly recorded on November 19th, 1878.

Given.

BURRIS, *Judge.*

2d. The court charges you that if the original location of the Monitor lode within the time required by law sunk a sufficient discovery shaft thereon, posted at the point of discovery a sufficient location notice, and properly put out their boundary posts,
458 marking their surface boundaries, and, on June 20th, 1875, recorded their claim in the office of the county recorder by a sufficient location certificate, in compliance with the law, and the owners thereof have ever since then performed labor or made improvements thereon each year to the amount of one hundred dollars or more, then the plaintiff company's original grantor, John Dougherty, in attempting to locate the Annie lode to include a part of such surface ground and in sinking the discovery shaft thereon in October, 1878, was *prima facie* a trespasser in so doing, and the plaintiff

cannot recover in this action unless it shows that he was not a trespasser in so doing.

Given.

BURRIS, *Judge.*

3d. The court charges you that the plaintiff claims that the Monitor Lode claim was never properly located, and that the vein on which its discovery shaft is sunk does not run down through its surface ground as located to the southwest, but that it runs off from its surface ground through its southeast side line at a point about — feet from its discovery shaft, and that by reason thereof Dougherty was not a trespasser in locating the Annie Lode discovery shaft and a part of its surface ground within the boundary stakes of the Monitor lode.

Given.

BURRIS, *Judge.*

4th. The court charges you that the court submits to the jury the question as to whether the original location certificate of the Monitor Lode claim contains such a description thereof by reference to some natural object or permanent monument as identifies the
459 same with reasonable certainty, and directs the finding of a special verdict thereon. You will answer this question, which is submitted to you in writing, by writing thereunder the word "yes" or the word "no," as you find the fact to be.

Given.

BURRIS, *Judge.*

5th. In considering this question proposed to you for a special verdict you are instructed that the natural object or permanent monument contemplated by law need not be on the ground located, although they may be, and the natural object may consist of any fixed, natural object, and such permanent monument may consist of a permanent post or stake, firmly planted in the ground, or of a shaft sunk into the ground. It remains now for you to determine whether a miner seeking information from this record (that is, the original location certificate of the Monitor Lode claim), referring to the discovery shaft, the Ule lode, and the Ute and Henson creek, would be enabled to find the said Monitor lode with reasonable certainty. If he would your special verdict will answer this question "yes;" otherwise "no."

Given.

BURRIS, *Judge.*

6th. The court charges you that the defendants have introduced in evidence an additional certificate expressly referring to the original certificate of location of the Monitor lode, with a view to making same perfect and accurate. This additional certificate was made pursuant to an accurate survey of the lode, and there is no evidence

to show that in matter of description it is not sufficient. Even
460 though the description in the original location certificate is deficient, such deficiency is supplied by this additional certificate.

Given.

BURRIS, *Judge.*

7th. The court charges you that in the staking of a mining claim boundary stakes within the limit of 1,500 feet in length and 300 feet in width will govern courses and distances. Exactness in giving the number of feet is often difficult if not impracticable. Laws must be constructed reasonably with reference to the necessities of their application.

Given.

BURRIS, *Judge.*

8th. The court charges you that the owners of the Monitor Lode claim had a right to change their boundaries so as to include their lode wherever it ran by filing as they did an additional certificate, provided that in so doing they did not interfere with the existing rights of others at the time of the filing of the same. It is certain that the boundaries as given in such certificate did not interfere with any then existing rights of the plaintiff company.

Given.

BURRIS, *Judge.*

9th. The court charges you that the question here is, Is the course of the Monitor vein from the discovery shaft down the mountain towards the southwest, along the line claimed by defendants, or off through the southeast side line of the Monitor Lode surface grounds or otherwise, as claimed by plaintiff? And the court further charges you that upon this question the presumption is that the course of the vein is as located, and the plaintiff company must prove
461 that the course of the vein is not as located; otherwise, on this point, plaintiff cannot recover, and your verdict shall be for the defendants.

Given.

BURRIS, *Judge.*

10th. The court charges you that it is not sufficient that the plaintiff merely raises a doubt in your minds as to whether the Monitor vein runs as the lode is staked or not. The plaintiff must satisfy you by a preponderance of the testimony that the lode does not run as staked; otherwise upon this question you will find for the defendant-.

Given.

BURRIS, *Judge.*

11th. The court charges you that the discoverer and prior locator of a lode or vein has a right to stake his lode according to his best judgment as to where it runs.

Given.

BURRIS, *Judge.*

12th. Such prior locator has a right to move and change his boundary stakes upon his lode and take his ground thereon within the legal limits to suit himself at any time within sixty days after the date of his location or discovery notice.

Given.

BURRIS, *Judge.*

14th. The court charges you that when a vein branches in its course a prior locator has a legal right to follow with his location whichever branch of it he chooses at the time of making such location.

Given.

BURRIS, *Judge.*

16th. The court instructs the jury in the law of this case
462 that if the locators of the Monitor mine made the location on the Monitor lode or vein and staked it as running down the mountain in the direction of the Annie vein in controversy and uniting therewith or running parallel thereto substantially through the center of the surface ground of the Monitor Lode claim, the said Monitor locators or their assignees are entitled to the whole of said vein as staked, even if the alleged Enterprise vein crosses said Monitor vein and runs in the course of the Monitor vein as staked, provided that at such crossing the said veins course so together that it is simply conjectural that said "Monitor" lode is crossed by said so-called "Enterprise" vein and does not continue in its course as staked.

Given.

BURRIS, *Judge.*

17th. The court charges you that it is of no consequence where the Monitor lode runs up the mountain from the discovery shaft except so far as that may help you to determine whether it runs from the discovery shaft down the mountain.

Given.

BURRIS, *Judge.*

18th. The court instructs you that it is of no consequence where the so-called Annie vein runs in any part of its course if Dougherty was a trespasser in locating it. A trespasser's location is entirely void.

Given.

BURRIS, *Judge.*

20th. There is no evidence that the so-called Enterprise lode belongs to anybody else than the defendants.

Given.

BURRIS, *Judge.*

22d. The court instructs you that if you find for the de-
463 fendants generally you will sign the verdict submitted to you by their counsel.

Which instruction the court gave to the jury.

Endorsed as follows:

118. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Defendants' instructions. Filed Aug. 12, '82. E. D. Bouton, clerk.

464 *Instructions Asked by Defendants.*

13th. The court charges you that a prospector in locating his vein is not required to follow it through a fault or other obstruction which interposes solid country rock in its course, but in such case he may follow with his location any vein that continues on from the point of such obstruction in the general course of his original vein.

Refused.

BURRIS, *Judge.*

Refusal excepted to August 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

15th. The court charges you that if a prospector in locating his lode discovered by a first location secures continuous vein matter substantially along through the center of his surface ground in a continuous general direction and so that the extension of his end lines will include between them all of his surface ground, he will hold the same and every part thereof against all subsequent claimants.

Refused.

BURRIS, *Judge.*

Refusal excepted to Aug. 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

19th. This court charges you that there is no question in this case as to the rights of contesting claimants to any cross or uniting lodes.

Refused.

BURRIS, *Judge.*

Refusal excepted to Aug. 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

465 21st. If the defendants are entitled to anything as claimants of the Monitor lode they are entitled to the Enterprise discovery shaft and all the rights that attach thereto or to the so-called Enterprise vein within their surface ground.

Refused.

BURRIS, *Judge.*

Refusal excepted to Aug. 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

Endorsed as follows:
95. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.*, defendants. Instructions refused. Filed Aug. 12, 1882. E. D. Bouton, clerk, by J. Craig Miller, deputy.

466 And after the argument of the case to the jury the jury retired in due form and manner to consider of their verdict, and after consideration returned into court the following special and general verdict.

And immediately upon the return and reading of said verdict the defendants then and there in open court gave notice that they would file a motion and move the court to vacate and set aside said general verdict and grant a new trial herein, which they afterwards, as follows, did:

467 We, the jury, find the issues joined for the plaintiff, and that it is the owner of and entitled to the possession of the ground described in the complaint.

R. R. SMITH, *Foreman.*

Excepted to August 12th, 1882.

J. W. MILLS,
Def'ts' Att'y.

Endorsed as follows:
119. 215. District court. The Crooke M. and S. Co. *vs.* A. R. Bushnell *et al.* Verdict of jury. Filed Aug. 12th, 1882. E. D. Bouton, clerk.

In the District Court in and for the County of Hinsdale and State of Colo.

THE CROOKE MINING AND SMELTING COMPANY, Plaintiff,
vs.
A. R. BUSHNELL *et al.*, Defendants.

We, the jury in the above-entitled cause, find this as special verdict as to this question, to wit: Does the original location certificate of the Monitor Lode claim contain such a description thereof by reference to some natural object or permanent monument as identifies the same with reasonable certainty?

We answer the above question as follows, to wit, "yes."

R. R. SMITH, *Foreman.*

Endorsed as follows:
468 120. 215. District court. The Crooke M. and S. Co. *vs.* A. R. Bushnell *et al.* Special verdict of jury. Filed Aug. 12th, 1882. E. D. Bouton, clerk.

District Court in and for Hinsdale County, Colorado.

THE CROOKE MINING AND SMELTING COMPANY, Plaintiff,
vs.
A. R. BUSHNELL *et al.*, Defendants.

And now come the defendants in the above-entitled action and move the court to set aside and vacate the verdict of the jury therein rendered and grant a new trial in said action for the following reasons, to wit:

1st. Because of the misdirection of the court to the jury.

2nd. Because of the refusal of the court to instruct the jury as asked by the defendants.

3rd. Because of the improper admission of testimony upon the trial had against the objections of the defendants.

4th. Because of the refusal of the court to admit proper testimony upon the trial had when offered by the defendants.

5th. Because the court permitted the plaintiff company to peremptorily challenge in the impanelling of the jury that returned said verdict one more juror than it was entitled to peremptorily challenge.

6th. Because, although the juror Eastep had both formed and expressed an unqualified opinion upon the merits of the case,
469 and was otherwise disqualified and was challenged for cause by the defendants, the court refused to sustain such challenge.

7th. Because the court required the defendants to put in all of their evidence to prove that their vein ran substantially along through the center of their surface ground before the plaintiff had attempted to prove that it did not so run.

7 & ½. Because said verdict does not find correctly the facts required by statute to be found in such cases, nor conform to the requirements of law and the statutes in such cases.

8th. Because said verdict is against law, and the evidence in the case is insufficient to justify said verdict.

9th. For other and further reasons apparent upon the face of the record, papers, and proceedings, and the minutes of the court upon the trial in the case.

Dated Aug. 12th, 1882.

J. W. MILLS,
Att'y for Def'ts.

Endorsed as follows:

131. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Motion for new trial. Filed Aug. 15th, '82. E. D. Bouton, clerk.

Which motion afterwards at the same term coming on to be heard, the court overruled and rendered judgment in favor of the plaintiff; to which ruling and judgment the defendants then and there excepted.

470 District Court in and for Hinsdale County, Colorado.

THE CROOKE MINING & SMELTING COMPANY, Pl't'ff,
vs.
A. R. BUSHNELL *et al.*, Defendants.

Judgment having been rendered on the 15th day of August, 1882, in favor of the plaintiff and against the defendants in the above-entitled action, to which judgment the defendants excepted, come the defendants on the same day and prayed for the allowance of an appeal therefrom to the supreme court and ordered that the same is hereby allowed. Further ordered that the appeal bond of the defendants upon such appeal, with sufficient security, to be approved by the clerk of this court and conditioned as the law requires, be filed in the office of the said clerk by the 11th day of December, 1882, the same to be in the sum of seven hundred dollars; and the last said day is fixed for the allowance, signing, and sealing of the defendants' exception to the rulings, decisions, and opinions of the court in said action and upon the trial thereof and the settling of a bill of exceptions therein.

By the court:

C. W. BURRIS, *Judge.*

Dated August 15th, '82.

Endorsed as follows:

132. 215. District court. The Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Order of court allowing appeal. Filed Aug. 16th, '82. E. D. Bouton, clerk.

471 STATE OF COLORADO, } *ss:*
Hinsdale County, }

In the District Court in and for said County.

THE CROOKE MINING AND SMELTING COMPANY, Plaintiff,
vs.
A. R. BUSHNELL *et al.*, Defendants.

"Annie adverse."

It is hereby stipulated and agreed by and between the counsel for plaintiff and defendants above that the bill of exceptions in said case be signed, sealed, allowed, and settled by the Honorable George W. Henry, county judge in and for said county, at any time within sixty days from this date, upon three days' previous notice being given to the opposite resident counsel of the time and place when and where said bill will be tendered to said Henry for such signing, sealing, allowance, &c.; provided, in case the transcript of the reporter's short-hand minutes of evidence taken in said case be not completed and furnished for insertion in said bill within fifteen days from this date, then the time for settling said bill of exceptions shall be extended to and include forty-five full days from and after the day on which such transcript of the reporter's short-hand notes

of the evidence is so completed and delivered to defendants' attorney to be so as aforesaid inserted in said bill of exceptions, and the above notice of time and place as to settling cause shall be given as herein provided.

472 It is further stipulated that whenever said bill of exceptions shall be so as aforesaid signed, sealed, allowed, and settled by said Henry the same shall become and be made a part of the record in this case, the same in every respect as if settled by the judge of the district court of said Hinsdale county.

The entry in the court record shall conform to this stipulation and in any matter of variance this stipulation shall control.

Done in open court this 4th day of December, A. D. 1882, the same being the first day of the regular December term of said court and the exact time fixed at the last regular August term of said court for settling said bill of exceptions.

It is agreed that the appeal bond of defendants shall be filed in apt time if filed at the same time the said bill of exceptions shall be filed under this stipulation.

GERRY AND STIRMAN,
Attorney for Plaintiff.
J. W. MILLS,
Attorney for Defendants.

Endorsed as follows:

136. 215. District court. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Stipulation as to settling bill of exceptions and appeal bond. Filed Dec. 4th, 1882. E. D. Bouton, clerk.

Which was all of the proceedings in said action.

And on this 23rd day of June, A. D. 1883, pursuant to due
473 notice given, Gerry and Stirman appearing as attorneys for plaintiff and consenting and J. W. Mills appearing as attorney for defendants and moving therefor, the foregoing is allowed, signed, and sealed as the defendants' exceptions to the rulings, decisions, and opinions of the court in said action and upon the trial thereof and a true and correct bill of exceptions therein, and the same is made a part of the record in said action.

GEO. W. HENRY,
County Judge of Hinsdale County, Colorado. [SEAL.]

Endorsed: 138. 215. Crooke M. & S. Co. *vs.* A. R. Bushnell *et al.* Bill of exceptions. Filed June 23rd, '83. Arthur P. Cook, clerk.

The foregoing bill of exceptions settled, allowed, and signed and sealed by me, the district judge, presiding at the trial of this cause, this 13th day of November, 1885.

C. W. BURRIS,
Late Judge of District Court and Presiding at the Trial. [SEAL.]

474 Know all men by these presents that we, A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, of the county of Grant, State

of Wisconsin and city of Chicago, Illinois, as principals, and E. D. Bouton and J. Craig Miller, as sureties, are held and firmly bound unto the Crooke Mining & Smelting Company in the penal sum of seven hundred dollars; for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Lancaster, Wisconsin, this 31st day of October, in the year of our Lord one thousand eight hundred and eighty-two.

The condition of the above obligation is such that whereas the said Crooke Mining and Smelting Company, in an action brought by them against the above-bounden obligors, did, on the — day of August, one thousand eight hundred and eighty-two, at a term of the district court then being holden within and for the ——, in the county of Hinsdale and State of Colorado, obtain a judgment against the above-bounden obligors for the sum of — dollars and — cents, costs of suit, and for the recovery of the possession of certain lands and premises in the complaint in said action particularly described, from which judgment the said obligors have prayed for and obtained an appeal to the supreme court of said State of Colorado;

Now, if the said obligors shall duly prosecute said appeal
475 and shall moreover pay the amount of said judgment, costs, interest, and damages rendered and to be rendered against them, the said obligors, in case the said judgment shall be affirmed in the said supreme court, then the above obligation to be null and void; otherwise to remain in full force and virtue.

A. R. BUSHNELL. [SEAL.]
FRED. J. MILLER. [SEAL.]
JOHN SCHREINER. [SEAL.]
JOSEPH NATHAN. [SEAL.]
A. A. BOCK. [SEAL.]
JOHN G. CLARK. [SEAL.]
ADOLPH NATHAN. [SEAL.]
E. D. BOUTON. [SEAL.]
J. CRAIG MILLER. [SEAL.]

Endorsed as follows:

District court. 137. 215. Appeal bond. District court, Hinsdale county, Colorado. The Crooke Mining and Smelting Company, pl't'ff, *vs.* A. R. Bushnell *et al.*, def'ts. Approved and filed this 23rd day of June, A. D. 1883. Arthur P. Cook, clerk.

476 I, Arthur P. Cook, clerk of the district court of Hinsdale county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record, the bill of exceptions, and the appeal bond in a certain cause lately pending in said court on the defendants' side thereof, wherein The Crooke Mining and Smelting Company was plaintiff and A. R. Bushnell *et al.* were defendants.

In witness whereof I have hereunto set my hand and affixed seal of said court, at Lake City, this first day of October, A. D. 1883.

[SEAL.] ARTHUR P. COOK, *Clerk.*

Endorsed as follows:

Transcript of proceedings in suit. District court, Hinsdale county, August term, 1882. In the matter of The Crooke Mining and Smelting Company *vs.* A. R. Bushnell *et al.*

477 And on the same day, to wit, the 30th day of November, A. D. 1883, there was attached to said transcript and filed by said appellants, their assignment of errors in words and figures as follows, to wit:

Assignment of Errors.

I.

The court erred in receiving over defendants' objection any testimony under the complaint filed herein. Fol. 115.

II.

The court erred in admitting the location certificate of the Annie mine in evidence over the objection of the defendants. Fol. 151.

III.

The court erred in refusing to allow the witness, Joe Simonds, when testifying for plaintiff, to answer on cross-examination the following questions: "How does the vein come out of the Monitor shaft down that hill?" Also, "Is there not another strong vein coming down and running in the same crevice, starting from the Monitor shaft?" Also, "I will ask you if there is not a much stronger vein starting from this point, following down the red line and intersecting there with the black, and following the black on down and intersecting with the Annie vein." Fol. 172–'3.

IV.

The court erred in admitting in evidence over defendants' objection the articles of incorporation of the Crooke Mining and Smelting Company; also the certificate signed by the pres.
478 and sec. of said company appointing John J. Crooke as the agent on whom process could be served, &c., both as certified to by the sec. of state of Colorado & the Hinsdale county recorder; also the certified copy of the laws of New York under which said articles were taken out. Fols. 174–178.

V.

The court erred in receiving in evidence over the objection of defendants the deed to the Annie lode from John Doherty, the locator, to Joseph R. Simonds, dated Nov. 18th, 1878, and filed for record the same day at 11 a. m. Fol. 178.

VI.

The court erred in refusing to strike out on defendants' motion Plaintiff's Exhibit "A," the Annie location certificate, filed for record Nov. 18th, 1878, at 11.30 a. m. Fol. 179.

VII.

The court erred in admitting in evidence over objection of defendants the deed of the Annie from Joseph R. Simonds to George L. Doherty; also the deed of the Annie from Geo. L. Doherty to plaintiff; also the registry certificate of defendants' application for patent on the Monitor lode and of the filing of plaintiff's adverse. Fol. 180–'2.

VIII.

The court erred in sanctioning and adopting a rule of practice which necessarily shifted the burden of proof by requiring defendants to establish affirmatively the existence of the Monitor vein in substantially the center of the entire Monitor surface ground
479 before any testimony tending to question such existence had been introduced by plaintiff. Fols. 296–'7.

IX.

The court erred in allowing over defendants' objection the defendants' witness, William Borie, to be asked and to answer in cross-examination the question, "Do you find any continuation of this vein—that is, the part of it you find exposed along in this direction beyond where it crosses this mark here through a shaft that is called the Enterprise shaft?" Fol. 306.

X.

The court erred in overruling defendants' objection to all questions relating to the course of the vein indicated on the map as running down to a junction with the Ule where defendants' witnesses had not been asked any such question in their examination-in-chief. Fol. 311.

XI.

The court erred in refusing to allow defendants to ask their witness, L. F. Miltenberger, to testify on direct examination as to the relative location of the Metropolitan with reference to the Annie vein and where the location stake of the Metropolitan was. Fol. 343.

XII.

The court erred in refusing to allow plaintiff's witness, John J. Crooke, to answer, on cross-examination, this question, "The Annie vein went into that sale, did it not?" Fol. 689.

480 XIII.

The court erred in refusing to receive in evidence the small map marked "Defendants' Exhibit 10," introduced for the purpose of showing the names of the lodes which plaintiff's witness, J. W. Abbott, testified he had surveyed on Ute mountain. Fol. 731.

XIV.

The court erred in giving to the jury over the objection of defendants the instructions asked by plaintiff numbered respectively as follows, to wit: Nos. 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16. Fols. 1057 to 1074.

XV.

The court erred in refusing to give to the jury upon the request of defendants instructions prayed by them numbered respectively as follows, to wit: Nos. 13, 15, 19, and 21. Fols. 1090 to 1093.

XVI.

The court erred in sustaining over the objection of defendants the general verdict in form and substance as returned by the jury. Fol. 1099.

XVII.

The court erred in overruling defendants' motion to set aside and vacate the general verdict of the jury rendered herein and to grant a new trial. Fol. 1100.

XVIII.

The court erred in giving judgment herein for plaintiff and against defendants. Fol. 1100.

481 XIX.

The court erred in sustaining over the objection of defendants the judgment or what purports to be the judgment herein. Fols. 109, 1100.

J. W. MILLS,
Attorney for Appellants.

Endorsed as follows:
1255. A. R. Bushnell *et al.*, appellants, *vs.* The Crooke M. & S. Company, appellees. Transcript of record and assignment of errors. Filed in supreme court Nov. 30th, 1883. James A. Miller, clerk.

482 And afterwards and on, to wit, January 23rd, A. D. 1885, came said appellee, by Patterson and Thomas, Esquires, its attorneys, and filed in said cause its joinder in error in words and figures as follows, to wit:

In the Supreme Court of Colorado.

A. R. BUSHNELL *et al.*, Appellants,
vs.
THE CROOKE MINING AND SMELTING COMPANY, Appellee.

Now comes the appellee, The Crooke Mining and Smelting Company, by its attorneys, Patterson and Thomas, and files this its joinder in error and says there is no error in the record of this cause.

PATTERSON AND THOMAS,
Att'ys for Appellee.

Endorsed as follows: In the supreme court. A. R. Bushnell *et al.*, appellants, *vs.* The Crooke M'g and Sm'g Co., appellee. Joinder in error. Filed in supreme court Jan. 23rd, 1885. James A. Miller, clerk. Patterson and Thomas, att'ys for appellee.

483 Afterwards and —, to wit, November 3rd, A. D. 1885, there was filed in said cause in the office of the clerk of said supreme court the following stipulation:

STATE OF COLORADO:

In the Supreme Court.

THE CROOKE MINING AND SMELTING CO., Plaintiff and Appellee,
vs.
A. R. BUSHNELL *et al.*, Defendants and Appellants. } No. 1255.

It is hereby stipulated that the bill of exceptions on file in this cause may be withdrawn from the files for the purpose of having the same settled, signed, and sealed by the Hon. C. W. Burris, the district judge before whom this cause was tried and whose term of office had expired prior to the 23rd day of June, 1883, at which time the said bill of exceptions was by stipulation allowed, signed, and sealed by the Hon. Geo. W. Henry, county judge of the county of Hinsdale.

Dated at Denver, Nov. 3rd, 1885.

L. G. DIXON,
Of Counsel for Def'ts and App'l'ts.
PATTERSON AND THOMAS,
Attorneys for Pl'f and Appellee.

Endorsed as follows:
No. 1255. State of Colorado. In the supreme court. The Crooke Mining and Smelting Co., pl't'f and appellee, *vs.* A. R. Bushnell *et al.*, d'f'ts and appellants. Stipulation for withdrawing bill of exceptions, &c. Filed in supreme court November 3rd, 1885. James A. Miller, clerk.

484 And afterwards and on, to wit, the 15th day of February, A. D. 1889, the same being a juridical day of the December, A. D. 1888, term of said supreme court, and there being present

Honorable Joseph C. Helm, chief justice; Honorable Victor A. Elliott and Honorable Charles D. Hayt, justices; Albert Weber, Esq., sheriff of Arapahoe county, by Felix A. Richardson, bailiff of said county, and James A. Miller, clerk, the following further proceedings were had and entered of record in this cause, to wit:

"A. R. BUSHNELL, JOHN G. CLARK, ADOLPH Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, Appellants, *vs.* THE CROOKE MINING AND SMELTING COMPANY, Appellee.	No. 1255. Appeal from District Court of Hinsdale County.

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Hinsdale as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is manifest error in the proceedings and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, reversed, annulled, and altogether held for naught, and that this cause be remanded to said district court with directions that said district court enter judgment in accordance with the view expressed by this court in its opinion filed herein.

It is further considered and adjudged by the court that said appellants do have and recover of and from said appellee their costs in this behalf expended, to be taxed, and that they have execution therefor; and let the opinion of the court filed herein be recorded."

485 And thereupon and at the same session and day last aforesaid the said supreme court filed in the office of the clerk of said court in said cause its opinion in words and figures following, to wit:

A. R. BUSHNELL *et al.*, Appellants, *vs.* THE CROOKE MINING AND SMELTING COMPANY, Appellee.	No. 1225.

Appeal from the district court of Hinsdale county.

STALLCUP, *C.*:

The appellants were the owners of the Monitor Lode mining claim, and the appellee, a corporation, was the owner of the Annie Lode mining claim. Appellants had applied for a patent, and this action was commenced January 10th, 1880, by appellee in support of an adverse claim to a portion of the premises intersected by the exterior lines of the Monitor claim. The location of the Monitor was prior to that of the Annie. It was contended by appellee that they were two distinct and separate lodes, and that the Monitor lode

had departed from the side lines of the Monitor claim as located before reaching the premises in dispute. The appellants claimed that the Monitor lode kept within the side lines of the Monitor
486 claim as located and was the identical lode upon which the Annie discovery was made and the discovery shaft sunk, and that the said shaft was within the said side lines of the Monitor claim. Evidence was adduced tending to sustain these respective positions, but the jury found for the appellee, the court gave judgment accordingly, and the case is here on appeal.

1. In the complaint filed by appellee it is alleged that it is a corporation duly authorized, etc., the owner of the Annie Lode mining claim, in the actual occupation and possession thereof, and that it claims the right to occupy and possess the same by virtue of conveyance thereof from certain parties who had duly discovered and located the same and had acquired the right to occupy and possess the same by virtue of discovery and location; that on the 1st day of September, 1879, defendants wrongfully entered upon and ever since hitherto have wrongfully withheld possession of that certain portion of the Annie Lode claim specifically described, and that the action is in support of an adverse claim.

In the answer of the appellants to said complaint specific denials are made to the allegations thereof, denying the plaintiff's right to occupy and possess the said Annie lode by reason of the conveyance set up or by any other reason or through any other means.

By section 269 of the Code it is provided that in actions for the possession of real estate premises it shall be stated in the complaint that the plaintiff is entitled to the possession of the premises.
487 It will be seen that the complaint in this action does not contain such statement specifically made. After the answer and upon the trial the appellants first made objection to the complaint on this account by objecting to the introduction of any evidence. The court denied this objection, and the questions are now presented, Was there error in such denial, and is the complaint sufficient to sustain a judgment in the case?

It will be seen by the said allegations of the complaint that it was stated in an indefinite way that the plaintiff was entitled to the possession of the premises, and, as appears from said denial in the answer, the statement in this regard was accepted as sufficiently definite and specific and was accordingly specifically denied in the answer.

The indefinite character of the complaint in this regard was thereby waived.

Little *vs.* Dougherty, 11 Colo.

The essential facts are shown by the allegations of the complaint, and after answer denying the same it is immaterial whether or not they were well stated in the complaint.

Hughes *vs.* Brewer, 7 Colo., 583.

Rhodes *vs.* Hutchuns, 10 Colo., 258.

These adverse proceedings are to determine adverse claims and are incidental to the acquisition of title to mining claims from

the General Government. Whatever defect there is in the complaint in not specifically alleging right to possession was supplied
488 and cured by the denials and allegations of the answer.

Haggard *vs.* Wallen, 6 Neb., 271.
Shartle *vs.* Minneapolis, 17 Minn., 308.
Dayton Ins. Co. *vs.* Kelly, 24 Ohio St., 345.
De La Mar *vs.* Hurd, 4 Colo., 442.

The ruling of the court was right and the complaint is sufficient.

2. The verdict was as follows: "We, the jury, find the issues joined for the plaintiff, and that it is the owner of and entitled to the possession of the ground described in the complaint." It is objected there that the verdict goes beyond the issues in that it finds the plaintiff entitled to possession. As we have seen, the verdict was responsive to the issues tried and submitted and sufficiently presented by the complaint and answer. The verdict established the plaintiff's title by declaring it to be the owner of the premises in controversy and hence it is not obnoxious to the objections mentioned in former opinions of this court.

McGinnis *vs.* Egbert, 8 Colo., 54, 55.
Becker *vs.* Pugh, 9 Colo., 589.
Manning *vs.* Strehlow, 11 Colo.

3. Judgment was entered upon the verdict as follows: "This cause coming on to be heard upon defendent's motion to set aside the verdict of the jury hereinbefore recorded and for a new trial of said cause, the court, being fully advised in the premises, overrules the said motion and orders that judgment be entered herein in accordance with said verdict.

It is therefore ordered by the court that the said plantiff is
489 the owner and entitled to the possession of the Annie Lode mining claim, 1,500 feet in length and 300 feet in width, situate in the Galena mining district, in the county of Hinsdale and State of Colorado."

It is objected to this judgment that it is not according to the verdict in that the premises specifically described in the complaint are not so described in the judgment and not accordingly limited to the premises in controversy as described in the complaint. This was an erroneous entry of the judgment and not according to the verdict and order of the court, as the appellee was entitled thereupon to have it entered. Such error may be corrected by direction of this court. The entry thereof should have been as follows:

It is therefore considered by the court that the said plaintiff is the owner and entitled to the possession of the premises described in the complaint of the plaintiff herein, viz: That portion of the Annie Lode mining claim situate in Galena mining district, county of Hinsdale, Colorado, bounded and described as follows: Beginning at the northwest corner (it being corner No. 5) of the Monitor claim, running thence south 13° 25′ west 341.5 feet, thence south 60° 27′ west 408.5 feet, thence south 48° 08′ west 463.5 feet, thence south 34° 20′ west 99.6 feet, thence south 55° 40′ east 112.8 feet to the

west side line of the Ulè lode (being survey plat No. 147*a*), thence north 51° 35′ east 91.6 feet to the corner No. 9 of said Ulè lode, thence north 69° 40′ east 237 feet to corner No. 8 of said Ulè
490 lode, thence north 68° 56′ east 40.8 feet, thence north 34° 20′ east 887.1 feet to the northeast end line of said Monitor claim, thence north 41° 31′ west 135.1 feet to the place of beginning, together with the costs by plaintiff laid out and expended, and that plaintiff may have execution therefor.

4. Upon the trial of the case the appellee adduced evidence tending to show the discovery, location, and conveyance of the Annie lode and the course therof with reference to the side lines of the Annie and Monitor and to repel the inference that the Monitor was identical with the Annie lode, but made no attempt to show the course of the Monitor lode with reference to the side lines of the location thereof, until on rebuttal, when evidence was adduced tending to show that the Monitor lode departed from the side lines thereof before reaching that part of the location containing the premises in dispute, and that no right to the premises in dispute was acquired by the discovery and location of the said Monitor lode.

Upon the defense the appellants went forward and adduced evidence tending to show that the Monitor lode, upon which discovery was made and discovery shaft sunk, ran within the side lines of the Monitor claim, as located, across the side lines of the Annie into the lode claimed as the Annie, and that it was in reality identically the same lode. Before going into this branch of their evidence they asked the court to say if they were required to do so in the *per*mises. The court answered as follows: "You may pursue
491 your own course; the court rules upon just such questions as are properly presented for its decision, and not in advance of the time they are presented."

The appellants now complain that by going into this branch of the case in their defense that they unnecessarily took the burden thereof, and that the court erred in not directing them in the premises. It is difficult to see how error could be assigned upon such premises. The appellee in making its case adduced evidence tending to show that the Annie lode took a course and direction, not to the Monitor discovery shaft, but within the side lines of the Annie location, passing the Monitor discovery shaft at a distance of over two hundred feet therefrom, and probably assumed this was sufficient to overthrow the inference that the Monitor lode remained within its side lines down to or through the premises in dispute, and rested without further evidence upon this branch of the case. The appellants proceeded to this branch of the controversy in their defense, and adduced evidence tending to show a lode extending from the Monitor discovery shaft down into the Annie claim, and from that point to the Annie discovery shaft.

Upon the rebuttal the appellee adduced evidence tending to show that the said lode, which was claimed as the Monitor lode, extending down into the Annie lode, was a distinct and separate lode and not identical with either the Monitor or Annie, and by name the

Enterprise lode; that it crossed both the Monitor and the Annie, and at the point where it came in contact with the Annie lode it
492 did not stop or lose itself in the Annie lode, but continued directly through, across, and beyond the Annie lode; that the Monitor lode, upon which the Monitor discovery shaft was sunk, took a course passing beyond the side lines of the Monitor location upon the side farthest from the Annie lode, and before reaching that part of the Monitor location containing the premises in dispute. In this request for directions there was no question presented to the court requiring an order or decision, and the court made none in the premises. Whether the appellants unnecessarily entered into this branch of the case upon their defense or not is not a question properly in the case. There was no error in the action of the court thereon.

The controlling issue in the case, we think, was fully understood by the jury and was clearly stated by the court in the 9th instruction, viz: "The principal point in the controversy is, upon what vein was the Monitor claim located or what is the course of said vein. The defendants allege and seek to prove that the location was made upon a vein which runs from the discovery shaft of the Monitor across and towards the vein upon which the Annie claim was located, while the plaintiff assert and seek to prove that the location was made upon a vein which runs from the Monitor shaft down and nearly parallel with the Annie lode, and which empties into or connects with the Ulè lode.

"This is the principal point in controversy, and to determine which claim is best supported by testimony and reason is the province and duty of the jury."

493 Instruction number 13 was as follows: "If the jury believe from the evidence that the vein which runs across from below the Monitor discovery shaft towards the vein upon which the Annie discovery shaft is sunk, and which the defendants claim is a part of the Monitor vein, crosses and continues beyond the vein upon which the Monitor discovery shaft is sunk and into and beyond the Enterprise shaft, then the vein is not the Monitor vein and the location is not made upon it, and if the Annie lode is more than 150 feet distant from the true Monitor vein in its course through the several claims the defendants cannot recover."

It is urged by counsel for appellants, with much force and confidence, that this instruction, No. 13, is erroneous in that the court thereby assumes the existence of a fact in dispute, namely, that the Monitor lode continues across another lode called the Enterprise lode. The map used at the trial shows that the Monitor and Annie lodes as claimed by appellee run parallel with each other, being from 155 to 243 feet apart; that the Annie lode lies to the west from the Monitor; that they are on the side of a mountain which slopes southwesterly; that the discovery shaft of the Annie is down the mountain some 400 feet further than the discovery shaft of the Monitor. On this map is also shown what is called the Enterprise lode with a discovery shaft and is claimed by appellee to be a lode running down from the discovery shaft southwesterly across

towards the Annie and in the direction of the Annie dis-
494 covery shaft, crossing what is claimed by appellee to be the Monitor lode about 60 feet below the Monitor shaft; so that the lines on the map representing what appellees claim to be the Monitor and Enterprise lodes cross each other, showing at the place of crossing a figure something like the letter X. At the top of the right upper horn of the figure is where the discovery shaft of the Enterprise appears, and at the top of the left upper horn of the figure is where the discovery shaft of the Monitor appears.

As to the lode or lodes represented by the two right horns of the figure, there was conflicting evidence as to the existence of any lode there, and that there was nothing of the lode character there was claimed by appellants and testified to by appellants' witnesses, while the contrary was claimed by appellee and testified to by appellee's witnesses.

As to the lode or lodes represented by the two left horns of the figure, there was no dispute as to the lode character thereof, both parties conceding and maintaining the same.

Appellants claiming that the same was the Monitor lode and that there was no other lode there except possibly a branch or spur extending up towards the discovery shaft of the Enterprise, and appellee claiming that there were two lodes there, viz., the Monitor and the Enterprise, and that they crossed each other there as indicated by the figure.

Now, looking to the said instruction complained of, it will
495 be seen that thereby the court assumes the existence of a lode "across from below the Monitor discovery shaft, running towards the Annie." It will also be seen that the lode indicated by the lower horn to the left side of the figure is what the court refers to by the language used.

The instruction leaves two questions with the jury:

First. Does this lode "across from below the Monitor discovery shaft, running towards the Annie," extend up to and beyond the said Enterprise discovery shaft?

Second. Does it cross the Monitor lode in its course; in other words equivalent thereto, does the Monitor lode cross it?

While the existence of the Monitor lode is assumed by the court in this instruction, it must be apparent that its course or continuation across this lode is not assumed, nor is it assumed that this lode is not the continuation of the Monitor lode.

In view of the clear statement and presentation of the issue in this regard, shown by the said instruction number 9 and the map referred to, we think this instruction 13 is clear of error, and that there is nothing in the record to warrant a reversal of the judgment given; that it should be affirmed and the case remanded with direction to enter judgment according to the views herein expressed.

We concur.

RISING, *C.*
DE FRANCE, *C.*

496 *Per Curiam:*

For the reasons stated in the foregoing opinion the judgment is reversed and the cause remanded with directions that a judgment be entered in accordance with the views expressed.

Endorsed as follows:
Filed in supreme court Feb. 15th, 1889. James A. Miller, clerk.

497 And, to wit, on the 21st day of March, A. D. 1889, came appellants, by their attorneys, Luther S. Dixon and J. Warner Mills, Esquires, and filed in said cause their petition for rehearing in words and figures following:

In the Supreme Court of the State of Colorado.

THE CROOKE M. & S. COMPANY, Plaintiff & Appellee,
vs.
A. R. BUSHNELL *et al.*, Defendants & Appellants. } No. 1255.

To the honorable the supreme court of the State of Colorado:

This the petition of the above-named defendants and appellants, A. R. Bushnell *et al.*, respectfully shows that they are aggrieved by the decision and judgment of this honorable court in the following particulars, to wit:

First. In taking plaintiff's instruction No. 9 (Abstract, page 139) as decisive of the issues joined, and then justifying instruction No. 13 (Abstract, page 142) by representing that the veins in issue took the form of the letter X, and that this portion of such figure > indicated the direction of undisputed veins, and that the only disputed
498 veins were properly indicated by the other side of the said figure, thus <.

And your petitioners respectfully submit that such error has intervened by a misunderstanding of the testimony of the witnesses as applicable to the duplicated letters and figures on the maps to which said witnesses have referred, all which can be made clear and convincing and the palpable and grave error in said instruction easily pointed out if your petitioners are but allowed to support this their petition for rehearing by an oral argument.

Second. In ignoring the radical error involved in instruction No. 16 (Abstract, page 144) when it can be clearly shown by reference to the map and the testimony of the witnesses there was no question whatever in the case as to the rights of claimants to cross or uniting lodes; still, notwithstanding, the said instruction quotes as applicable to the case section 6, page 466, R. S. 68 (same G. S., 83, page 721, section 2391). Our refused instruction No. 19 (Abstract, page 151) should have been given.

Third. In failing to recognize the error in plaintiff's instruction No. 10 (Abstract, page 140), which assumes there was, at least, some competent, legal evidence to which it applied, whereas the record fails to disclose it.

Fourth. In failing to recognize the grave error contained in plain-

tiff's instruction No. 12 (Abstract, page 142), which ignores
499 the fact that at least two or three of plaintiff's witnesses located the Monitor vein as running between the letters "E" and "H" at a much less distance than 150 feet from the so-called "Annie" vein. (Testimony of Mullen and Duggan, folios 698, 613, 597.)

Fifth. In failing to recognize the error in instruction No. 15 (Abstract, page 143), given at the request of the plaintiff, and which incorrectly states the law where, as in this case, there are no intervening rights involved.

Sixth. In failing to recognize that the undisputed evidence shows continuous quartz, ore, and vein matter in the same general direction from the Monitor discovery shaft substantially through the center of the Monitor surface ground, in the direction of "O" and down to and including the "Annie" discovery shaft at the point "C," which conforms to all definitions of the word "lode," and accordingly entitles these applicants to judgment on the plaintiff's own proof; hence our refused instructions 13 and 15 (Abstract, page 151) should have been given.

Seventh. In ignoring the error committed by the court below in trying this case on a wrong theory of the law (Farnum *vs.* U. S., 1 Colo., 317), as there was no legitimate question whatever in any of the issues as to cross lodes or veins or the law relating thereto, whereas the court assumed there was throughout the trial, and further assumed that there could be a conflict between cross-lodes on the surface, which the following cases seem to deny:

Atkins *vs.* Hendree, 1 Ida., 107.
500 S. C., Mor. M'g R'ts, 6th ed., 89.
S. C., 2 Mor. M'g R'p's, 328.
Branagan *vs.* Dulany, 8 Colo., 408.
Pardee *vs.* Murray, 4 Mont., 279.

Moreover, the U. S. Rev. Stat., sec. 2322, give to appellants the "exclusive right of possession and enjoyment" of all other veins and lodes having their apexes within the Monitor surface ground, which would give to these appellants beyond all question the so-called "Enterprise" that is alleged to "cross" the "Monitor" on the surface; and certainly a vein that is thus our own cannot be used by one who has no interest either in the "Monitor" or "Enterprise" title to create any question of lode crossing between them or any other question of conflict. Under such circumstances there is but one grant, and it is all the "Monitor" grant and its rights and title, and such grant is in nowise severable into a part "Monitor" and a part "Enterprise," no separate life or vitality being given to the said so-called "Enterprise."

Hence your petitioners say that when plaintiff did not show or attempt to show any location of the so-called "Enterprise" lode it was certainly reversible error for the lower court to refuse their instruction No. 21. (Abstract, page 152.)

If this doctrine is allowed to prevail it is then possible for any person to merely give a name to a spur or branch of a lode

within its located boundaries and make all the rights of the lode itself depend wholly upon the multifarious questions that may be predicated of the spurs or branches.

501 Such certainly is not the policy of the law, and no litigant should be permitted to disturb the natural rights of the lode itself on the theory that something found within its surface in close and intimate connection with it is not a spur or branch, but a crossing vein, unless such litigant at least connects himself with the title of such alleged cross-vein and shows it to be separately and properly located, and that he stands before the court asserting the rights of a cross-lode claimant.

Your petitioners further represent to this honorable court that while they have sought hereby to show that grave and important reasons exist for a rehearing of this case, still they have not attempted to elaborate those reasons either by the argument or authorities which they can easily adduce, and they respectfully submit that if your honors will but do them the courtesy and justice to set this petition for oral hearing that they may then make clear their several positions by reference to the maps, letters, and figures in the case, which it would otherwise be impossible to do.

And for the correction of the aforesaid errors your petitioners will ever pray, &c.

LUTHER S. DIXON,
J. WARNER MILLS,
Att'ys for Petitioners.

Endorsed as follows:

No. 1255. Bushnell *vs.* Crooke M. and S. Co. Petition for rehearing.

502 And afterwards and on, to wit, June 26th, A. D. 1889 (oral argument having been heretofore made by the parties), the said day being a juridical day of the April, A. D. 1889, term of said supreme court, and there being present Honorable Joseph C. Helm, chief justice; Honorable Victor A. Elliott and Honorable Charles D. Hayt, justices; Albert Weber, Esq., sheriff of Arapahoe county, by Felix A. Richardson, bailiff of said county, and James A. Miller, clerk, the following further proceedings were had and entered of record in said cause, to wit:

A. R. BUSHNELL *et al.*, Appellants, *vs.* THE CROOKE MINING AND SMELTING COMPANY, Appellee.	No. 1255. Appeal from District Court of Hinsdale County.

At this day, upon consideration first had, it is ordered by the court that appellants' petition for a rehearing herein be, and the same is hereby, denied.

503 And on, to wit, the 31st day of August, A. D. 1889, said appellants filed in the office of clerk of said court their petition for allowance of writ of error from the honorable the Supreme

Court of the United States to the said supreme court of Colorado, and which said petition, as also the order of Honorable Joseph C. Helm, chief justice of the supreme court of Colorado, allowing said writ of error endorsed thereon, is in words and figures following, to wit:

STATE OF COLORADO, } *ss:*
Supreme Court. }

A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, Defendants and Appellants,
vs.
THE CROOKE MINING AND SMELTING COMPANY, Plaintiff and Appellee.
} No. 1255.

To the Hon. Joseph C. Helm, chief justice of the said supreme court:

Now come the above-named appellants and defendants, by J. Warner Mills, their attorney, and complain that in the record and proceedings and also in the rendition of a judgment in the suit of The Crooke Mining and Smelting Company, plaintiff and appelle-, *vs.* A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph
504 Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, defendants and appellants, the same being case No. 1255 in the docket of the said supreme court, the same being the highest court of law and equity in the State of Colorado in which a decision could be had in said suit, and in which a final judgment was rendered resolving the merits of the said controversy against the said appellants on Wednesday, June 26th, A. D. 1889, and wherein was drawn in question the validity of the title of said appellants to all that certain lode or mining claim known and called the Monitor lode or mine, which said title was claimed under and by virtue of the Federal mining statutes, and especially sections 2319, 2320, 2322, and 2324 of the Revised Statutes of the United States, and the said appellants especially urged to this honorable supreme court that on the trial of the said suit in the court below they were seriously injured and aggrieved in maintaining their said title to the said lode by manifest error in the admission and rejection of evidence over the objection and exception of these appellants and in the giving and refusing to give certain instructions over the objection and exception of these appellants and in overruling defendants' motion for new trial and ordering and entering judgment for plaintiff, and which said several rulings and actions of said lower court were repugnant to the aforesaid provisions of the said United States Statutes and against the title of these appellants to said mine claimed thereunder, and this honorable supreme court of Colorado hath sustained the said several rulings and actions of the said lower court and hath ad-
505 judged the said title so claimed as aforesaid, is not valid in so far as it conflicts with the so-called "Annie" lode or mine claimed by said The Crooke Mining and Smelting Company, and

hath adjudged that the Monitor lode does not continue through the surface ground of the Monitor Lode mining claim, but departs through the side line thereof, and hath ordered judgment to be entered in favor of the said The Crooke Mining and Smelting Company for all the territory in conflict (which embraces nearly all the said Monitor mine and, indeed, all the substantial and valuable portion thereof), and hath given these appellants a judgment only for costs by reason of the improper entry in form of the judgment in the lower court in favor — the said The Crooke Mining and Smelting Company, wherefore the decision and judgment of this honorable supreme court was and is against the said title so claimed, as aforesaid, and especially set up and urged to be protected under and by virtue of the terms and provisions of the said statutes of the United States, all which appears in the record and proceedings in said suit, and manifest error hath happened, to the great damage of the said A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock.

Wherefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. WARNER MILLS,
Att'y for said Petitioners, A. R. Bushnell et al.

506 Allowed this 31st day of August, A. D. 1889.

JOSEPH C. HELM,
Chief Justice Supreme Court of Colo.

Endorsed as follows:

No. 1255. In the supreme court of Colorado. A. R. Bushnell *et al.*, appellants, *vs.* The Crooke M. and S. Company, appellee. Application for the allowance of a writ of error to the Supreme Court of the United States and other process. Filed in the supreme court of Colorado this 31st day of Aug., A. D. 1889. James A. Miller, clerk. J. Warner Mills, att'y for appellants.

507 And thereupon and on the day last aforesaid said appellants filed their bond in the penalty prescribed by said chief justice; which said bond and the approval thereof is as follows, to wit:

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, as principals, and —— ——, as sureties, are held and firmly bound unto the Crooke Mining and Smelting Company in the full and just sum of one thousand dollars ($1,000), to be paid to the said The Crooke Mining and Smelting Company; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the April term, A. D. 1889, of the supreme court of the State of Colorado, in a suit pending in said court between A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, appellants and defendants, and The Crooke Mining and Smelting Company, defendant and appellee, judgment *is* rendered against the said The Crooke Mining and Smelting Company for costs only, and a judgment was directed to be entered in favor of the
508 said appellee upon the merits of case, — having obtained a writ of error to reverse the judgment of the said supreme court of Colorado, and a citation directed to the said The Crooke Mining and Smelting Company, citing and admonishing it to be and appear at a regular court of the United States to be held at Washington, D. C., on the 14th day of October next:

Now, the condition of the above obligation is such that if the said A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void else to remain in full force and virtue.

A. R. BUSHNELL, [SEAL.]
JOHN G. CLARK, [SEAL.]
JOSEPH NATHAN, [SEAL.]
ADOLPH NATHAN, [SEAL.]
JOHN SCHREINER, [SEAL.]
FRED. J. MILLER, [SEAL.]
A. A. BOCK, [SEAL.]
By J. WARNER MILLS,
Their Att'y at Law and in Fact. [SEAL.]
E. D. BOUTON. [SEAL.]
G. R. WEIR, [SEAL.]

Approved:
JOSEPH C. HELM,
Judge, Chief Justice of Colo.

509 Endorsed as follows:

Justification.

THE UNITED STATES OF AMERICA.

STATE OF COLORADO, } *ss:*
Arapahoe County, }

E. D. Bouton and G. R. Wier, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in property the sum below set opposite his name—that is to say, one thousand dollars ($1,000)—over and above all his debts and liabilities and in property subject to levy and sale upon execution.

E. D. BOUTON.
G. R. WEIR.

Subscribed and sworn to before me, at Denver, this 31st day of Aug., A. D. 1889.

W. H. WOLFUSBERGER,
Notary Public.

In the supreme court of the State of Colorado. A. R. Bushnell *et al. vs.* The Crooke M. and S. Company. Bond. $1,000.00. Filed this 31st day of August, A. D. 1889. James A. Miller, clerk.

510 And thereupon and on the day last aforesaid the citation issued by Honorable Joseph C. Helm, chief justice of the supreme court of the State of Colorado; which said citation and the proof of service thereof is in words following, to wit:

Citation, U. S. Supreme Court.

UNITED STATES OF AMERICA:

Supreme Court, District of Colorado.

The United States of America to the Crooke Mining and Smelting Company, Greeting:

You are hereby cited and admonished to be and appear at the regular court of the United States Supreme Court, to be holden at Washington, D. C., on the 14th day of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Colorado, wherein A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to all parties in that behalf. Security and bond for costs and damages have been filed and approved as required by law.

Witness the Honorable Joseph C. Helm, chief justice of
511 the supreme court of the State of Colorado, this 31st day of August, in the year of our Lord one thousand and eighty-nine.

JOSEPH C. HELM,
Chief Justice Supreme Court of Colorado.

Endorsed as follows:

Proof of Service.

THE UNITED STATES OF AMERICA, }
State of Colorado, } *ss:*

On this 6th day of September, A. D. 1889, personally appeared J. Warner Mills before me, the subscriber, a clerk of the supreme court of the State of Colorado, and makes oath that he delivered a

true copy of the within citation to Thomas M. Patterson, Esq., one of the members of the law firm of Patterson & Thomas, at their office, in the city of Denver, county of Arapahoe and State aforesaid, and the said firm of Patterson & Thomas were then and there the attorneys of record of the within-named defendant in error, The Crooke Mining and Smelting Company.

J. WARNER MILLS.

Sworn to and subscribed before me this 6th day of September, A. D. 1889.

JAMES A. MILLER, [SEAL.]
Clerk Supreme Court, Colorado.

Further endorsed as follows:

Supreme court of the State of Colorado. A. R. Bushnell *et al.*, plaintiffs in error, *vs.* The Crooke M. & S. Co., defendant in error. J. Warner Mills, att'y for plaintiff- in error.

512 Also further endorsed as follows:

We hereby accept service of the within writ this 6th day of September, 1889. Patterson & Thomas, att'ys for The Crooke M. and S. Company.

513 STATE OF COLORADO, *ss:*

I, James A. Miller, clerk of the supreme court of the State of Colorado, do hereby certify the above and foregoing to be true and complete copies of the transcript of the record and proceedings in a certain cause lately pending herein upon appeal from the district court of Hinsdale county, wherein A. R. Bushnell *et al.* were appellants and The Crooke Mining and Smelting Company was appellee, the assignments of error filed therewith, joinder in error of appellee, stipulation to amend bill of exceptions, the final judgment, the opinion of the court, the petition for rehearing by appellants, the order entered upon the oral argument upon said petition, and the denial thereof, the petition for allowance of writ of error from Supreme Court of the United States and order of Chief Justice Helm allowing same endorsed thereon, the bond for supersedeas and the citation with proof of service, all as fully and completely as the same appear from the records and files in said cause in my office now remaining, and to which said record is appended the original maps used upon the hearing in said supreme court, as also the original writ of error from the honorable the Supreme Court of the United States, a copy of said writ being lodged in my office on Aug. 31st ult. for def't in error.

In testimony whereof I have hereunto affixed my hand and the seal of said supreme court, at my office, in the city of Denver, this 26th day of September, A. D. 1889.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER,
Clerk of Supreme Court, State of Colorado.

Cost of This Transcript.

1,135 folios, 20c.	$227 00
Certificate thereto	1 00
Certificate to maps	1 00
	$229 00

514 UNITED STATES OF AMERICA :

In the Supreme Court.

A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, JOSEPH Nathan, John Schreiner, Fred. J. Miller, A. A. Bock, Plaintiffs in Error,

vs.

THE CROOKE MINING & SMELTING COMPANY, Defendant in Error.

Error to the supreme court of Colorado.

Assignment of Errors.

I.

The supreme court of Colorado erred in sustaining the ruling of the district court of Hinsdale county refusing to allow the witness Joe Simonds, when testifying for the said Crooke M. & S. Company, to answer on cross-examination the following questions: "How does the vein come out of the Monitor shaft down that hill?" also, "Is there not another strong vein coming down and running in the same crevice starting from the Monitor shaft?" also, "I will ask you if there is not a much stronger vein starting from this point following down the red line and intersecting with the Annie vein?" Fols. 163, '4, '5.

515 II.

The said supreme court erred in sustaining the said district court in ruling over our objection that William Borie, a witness for the defendants, could be asked and required to answer on his cross-examination this question: "Do you find any continuation of this vein—that is, the part of it you find exposed along in this direction beyond where it crosses this mark here through a shaft that is called the Enterprise shaft?" Fol. 289.

III.

The said supreme court erred in sustaining the ruling of the said district court, over our objection, permitting questions relating to the course of the vein indicated on the map as running down to junction with the Ulè, notwithstanding defendants' witnesses had not been asked any such questions in their examination-in-chief. Fol. 294.

IV.

The said supreme court erred in sustaining the said district court in its rulings above set out in errors I, II, III; which said rulings clearly show that the said district court was proceeding upon the theory that it did not devolve upon the said Crooke M. & S. Co., though plaintiff at the trial, to carry the burden of proving its own mine, called the "Annie," was a valid location and not a trespass; it was confessedly made within the boundaries of the Monitor mine owned by the defendants at the trial, and if the said Monitor was as located, then the said Annie location was a trespass; yet defendants, by said rulings, were not allowed, on cross-examination of plaintiff's witnesses, to show or to endeavor to show such fact,
516 while the said rulings did permit the said company, upon the cross-examination of our witnesses, to show or to endeavor to show that our Monitor vein departed from the boundaries, thus contrary to the Federal mining statutes, shifting upon us the burden of proving affirmatively that the Monitor vein actually continued in its course as staked and located, and the said lower court, with the erroneous approval of the said supreme court, further directly contributed to the burden of proof being so as aforesaid cast upon said defendants by refusing to hold, when asked so to do, that they (the defendants) should not be required to prove the Monitor vein continued substantially throughout the whole length of the Monitor Lode mining claim as located and staked until the said Crooke M. S. Company had given at least some evidence tending to show it did not so run and continue. Fol. 280.

V.

The said supreme court erred in approving those rulings of the said lower court which prevented defendants from showing or tending to show by the cross-examination of the plaintiff's witnesses that the said Annie vein did not pass the Monitor discovery shaft as claimed at a distance of two hundred feet or any other distance, but in fact ran directly into said shaft, thereby leaving no inference that the Monitor lode departed from its side lines before reaching the premises in dispute. Fols. 163–'75, 289, 1089–'90; see also fol. 324, especially assigned as error VI.

VI.

The said supreme court erred in approving the ruling of said lower court by which defendants were not permitted to ask their witness, L. F. Miltenberger, to testify on direct examination as
517 to the relative location of the Metropolitan with reference to the Annie vein and where the location stake of the Metropolitan was. Fol. 324.

VII.

The said supreme court erred in approving the following instruction given at the instance of the said plaintiff, to wit:

Plaintiff's Instruction No. 7.

The court instruct the jury that the plaintiff has properly established the discovery of the lode called the Annie and the location of the claim called the Annie claim—that is, the plaintiff had made out a *prima facie* right to the lode and claim, and unless the defendants have established by evidence a prior or better legal right to that part of the Annie and Monitor claims in dispute than did the plaintiff in the first instance, the plaintiff must recover. Fol. 1001.

VIII.

The said supreme court erred in approving the following instruction given at the instance of the said plaintiff, to wit:

Plaintiff's Instruction No. 8.

Under the acts of Congress and the laws of the State, a locator is allowed to take up fifteen hundred feet along the course of his vein and one hundred and fifty feet of surface ground on each side of the centre of his vein. The period of ninety days is given to the discoverer in which to prospect and discover the course of his lode. This may sometimes be determined by outcroppings on the surface, and sometimes it is necessary to sink pits or other workings to determine the true locality of the lode; in any event the law contemplates within the ninety days the course of the vein will be discovered and the location be made with reference to its course. The discoverer when his location is complete has the right to the
518 enjoyment and possession of all veins or lodes within his boundary lines when their tops or apexes are within these lines, but this right to the enjoyment and possession of other lodes than the one located depends upon their being within one hundred and fifty feet of the centre of his located vein, and the located vein must not have departed from the side lines in its course; if it does, the locator has no right to other lodes which are formed within his claim beyond the point at which the located vein departs from his side lines, even though they may be nearer than 150 feet to the vein after it leaves the side lines. In other words, the right of possession and enjoyment of other lodes than the one located and discovered depends upon their being found at a distance of 150 feet or less from the centre of the vein discovered and located, and upon the located vein being within the side lines of the claim as located. Fol. 1002–'4.

IX.

The said supreme court erred in approving the following instruction given at the instance of the said plaintiff, to wit:

Plaintiff's Instruction No. 9.

The defendants claim the ground in dispute by virtue of a prior location of the Monitor claim. Evidence has been introduced tend-

ing to show such a location, and it is for you to determine from that evidence what is the fact. After the question of location is determined, the principal point in controversy is upon what vein was the Monitor claim located or what is the course of the said vein. The defendants allege and seek to prove that the location was made upon a vein which runs from the discovery shaft of the
519 Monitor across and towards the vein upon which the Annie claim was located, while the plaintiff asserts and seeks to prove that the location was made upon a vein which runs from the Monitor shaft down and nearly parallel with the Annie lode and which empties into or connects with the Ulè lode. This is the principal point in controversy, and to determine which claim is best supported by testimony and reason is the province and duty of the jury. If the jury should believe from the testimony that the Monitor vein runs from the discovery shaft into the Ulè vein as claimed by plaintiff and as shown upon the accepted plat of the various claims, then the verdict of the jury should be for the plaintiff. Fol. 1005–'7.

X.

The said supreme court erred in approving the following instruction given at the instance of the said plaintiff, to wit:

Plaintiff's Instruction No. 10.

In determining which is the true Monitor vein, the vein the original locators had in mind when the location was made may aid the jury if from the evidence the jury can reasonably determine which vein that was. It is a fair presumption that when McConkey and Phillips completed their location that they had determined the true or approximate course of the vein they located; and the location as described and staked may aid the jury in determining what that course was. If from the evidence the jury should believe that the original locators, when the location certificate was made and filed, had in view and intended to locate the vein claimed by the plaintiff to be the Monitor vein, that fact may be a strong reason for considering that the vein so intended to be located is in fact the Monitor vein. Fol. 1008.

520 XI.

The said supreme court erred in approving the following instruction given at the instance of the said plaintiff, to wit:

Plaintiff's Instruction No. 11.

A discoverer cannot locate and claim two lodes by virtue of one discovery shaft. If the discovery shaft is sunk upon one lode and another lode intersects or crosses it, no matter at what angle, the location cannot be considered as being made upon the vein which crosses the one upon which the shaft is sunk, and it makes no difference what may be the relative richness or value of the two veins. If the location is properly made, the locator may hold so much of

the cross-vein as lies within one hundred and fifty feet of the course of the located vein upon each side thereof, but no more. It is the vein upon which the location is made that determines the right of the locator to the surface ground and the veins within it, and not the cross-vein, although the cross-vein might be richer and stronger than the one upon which the shaft was sunk. Fols. 1009–'10.

XII.

The said supreme court erred in approving the following instruction given at the instance of the said plaintiff, to wit:

Plaintiff's Instruction No. 12.

The distance between the Monitor vein, as it is claimed to exist by the plaintiff, and the Annie vein is at no point within the limits of the Monitor or Annie claims less than 150 feet. It is proven by the plaintiff and is not contradicted by the defendants that the distance between said veins varies from 157 feet to upwards of 240 feet,
and if you believe that the Monitor vein is in the place as-
521 serted by the plaintiff, then the distance between the two
veins may be taken by the jury as above stated, and if you should so find your verdict will be for the plaintiff. Fol. 1011.

XIII.

The said supreme court erred in approving the following instruction, given at the instance of the said plaintiff, to wit:

Plaintiff's Instruction No. 13.

If the jury should believe from the evidence that the vein which runs across from below the Monitor discovery shaft towards the vein upon which the Annie discovery shaft is sunk and which defendants claim is a part of the Monitor vein crosses and continues beyond the vein upon which the Monitor discovery shaft is sunk and into and beyond the Enterprise shaft, then that vein is not the Monitor vein and the location is not made upon it, and if the Annie vein is more than 150 feet distant from the true Monitor vein in its course through the several claims the defendants cannot recover. Fol. 1012.

XIV.

The said supreme court erred in approving the following instruction, given at the instance of the said plaintiff, to wit:

Plaintiff's Instruction No. 14.

The fact that a vein cannot be seen or traced in all its course upon or at a short distance beneath the surface of the mountain does not destroy its character as a vein nor does it give to a locator the right to take up and occupy some other vein because of its near proximity to the one which cannot be seen or traced in all its course.

The law contemplates that but one vein shall be located upon, and the rights of the locator within his claims depends upon the particular vein located and no other. Fol. 1013.

522 XV.

The said supreme court erred in approving the following instruction, given at the instance of the said plaintiff, to wit:

Plaintiff's Instruction No. 15.

While the statute gives to locators and their grantees the right to file additional location certificates and to take in abandoned territory and change the lines of the original location, it confers no right to change from the vein upon which the first location was made. Once a vein has been discovered and located, that vein cannot be abandoned and another appropriated unless there should be a complete new location made and all the steps required for any location be taken anew and fully completed to confer any rights under the location upon a different lode than the original. Fol. 1014.

XVI.

The said supreme court erred in approving the following instruction, given at the instance of the plaintiff, to wit:

Plaintiff's Instruction No. 16.

I instruct the jury that the legislature of the State has passed a law upon the subject of cross-veins and upon the subject of veins running into each other. While it declares that while one lode crosses, runs into, or unites with another the priority of record shall determine the rights of claimants, yet it also expressly provides that "in no case where it appears that two lodes cross one another shall the priority of record give any person the privilege of turning off from the crevice or lode which continues in the same direction of the main lode upon which he or they may have recorded their claim." And it further expressly provides that such location
523 shall at all times follow the crevice running nearest in the general direction of the main lode upon which he or they may have recorded their claim or claims. Fols. 1015–'16.

XVII.

The said supreme court erred in approving the refusal by the lower court of the following instruction asked by these defendants, to wit:

Instructions Asked by Defendants, No. 13.

The court charges you that a prospector in locating his vein is not required to follow it through a fault or other obstruction which interposes solid country rock in its course, but in such case he may

follow with his location any vein that continues on from the point of such obstruction in the general course of his original vein. Fol. 1033.

XVIII.

The said supreme court erred in approving the refusal by the lower court of the following instruction asked by these defendants, to wit:

Instructions Asked by Defendants, No. 15.

The court charges you that if a prospector in locating his lode discovered by a first location secures continuous vein matter substantially along through the center of his surface ground in a continuous general direction and so that the extension of his end lines will include between them all of his surface ground, he will hold the same and every part thereof against all subsequent claimants. Fol. 1033.

XIX.

The said supreme court erred in approving the refusal by the lower court of the following instruction asked by these de-
524 fendants, to wit:

Instructions Asked by Defendants, No. 19.

This court charges you that there is no question in this case as to the rights of contesting claimants to any cross or uniting lodes. Fol. 1033.

XX.

The said supreme court erred in approving the refusal by the lower court of the following instruction asked by these defendants, to wit:

Instructions Asked by Defendants, No. 21.

If the defendants are entitled to anything as claimants of the Monitor lode they are entitled to the Enterprise discovery shaft and all the rights that attach thereto or to the so-called Enterprise vein within their surface ground. Fol. 1033.

XXI.

The said supreme court erred in approving, over the objection of defendants, the general verdict in form and substance as returned by the jury. Fol. 1035.

XXII.

The said supreme court erred in approving the action of the said lower court in overruling defendants' motion to set aside and vacate the general verdict of the jury rendered herein and to grant a new trial. Fols. 1035, 1038–'42.

XXIII.

The said supreme court erred in giving these plaintiffs in error a judgment only for costs and in directing the said lower
525 court to enter a judgment in favor of the said The Crooke M. and S. Company for the premises in dispute; the judgment of the said supreme court should either have been an absolute reversal awarding these plaintiffs in error a new trial or directing a judgment to be entered in their favor for the premises in dispute. Fols. 1102, 1116, 1068–'71.

XXIV.

The said supreme court erred in directing judgment to be entered in favor of the said Crooke M. and S. Company for any part of the said "Annie" mine and much greater was the error in directing judgment to be entered in favor of said company for the whole thereof. Fols. 1068–'17, 1084–'86.

XXV.

The said supreme court erred in taking plaintiff's instruction No. 9 (fol. 1005) as decisive of the issues joined, and then justifying plaintiff's instruction No. 13 (fol. 1012) by representing that the veins in issue took the form of the letter X, and that this portion of such figure > indicated the direction of undisputed veins, and that the only disputed veins were properly indicated by the other side of the said figure, thus: <. Fols. 1097, &c., 1104.

XXVI.

The said supreme court erred in approving the instructions and conduct of the lower court by which the said plaintiff, over our objection, was permitted to inject into the trial of the case a question as to cross-veins in the absence of any showing what-
526 ever that there was an "Enterprise" location except in name, and in the absence of any proof whatever connecting plaintiff with the title to the so-called "Enterprise" lode and in the absence of any cross-lode or cross-lode claimant. Fols. 1110–'13.

XXVII.

The said supreme court erred in failing to hold pursuant to sec. 2322, U. S. Rev. Stat., that the said so-called "Enterprise" lode belonged to these defendants as a spur or branch of their said Monitor mine, and that their title thereto, with all the rights of possession and enjoyment connected therewith, could not be attacked upon any theory of surface crossing, but only by the rights of a subterranean cross-lode claimant pursuant to sec. 2336, U. S. Rev. Stat. Fols. 1110, 1033.

XXVIII.

The said supreme court erred in failing or refusing to hold that according not only to the defendants' evidence, but the plaintiff's

as well, the Monitor lode was a continuous, unbroken lode or vein in nowise departing from its side lines throughout the entire Monitor Lode mining claim within the definition, intent, and meaning of a lode as defined in the Federal mining statutes. Fols. 1108, 1032, 1033.

J. WARNER MILLS,
Attorney for Plaintiffs in Error.

Washington, D. C., Oct. 16, 1889.

527 In the Supreme Court of the State of Colorado, September Term, A. D. 1889.

A. R. BUSHNELL *et al.*, Appellants,
vs.
THE CROOKE MINING AND SMELTING COMPANY, Appellee.
} No. 1255. Appeal from District Court of Hinsdale County.

Now come appellants, by J. Warner Mills, Esquire, their attorney, and, upon their motion, leave is granted said appellants to withdraw from the files herein the maps used upon the hearing of this cause in this court for filing with the record in the Supreme Court of the United States in their suit pending therein on error to this court.

[Seal Supreme Court, State of Colorado.]

I, James A. Miller, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original order entered in the above-entitled cause on the 9th day of September, A. D. 1889, and now remaining of record in my office, and which said maps are hereto attached.

Witness my hand and the seal of the court affixed at my office, in the city of Denver, this eighteenth day of September, A. D. 1889.

JAMES A. MILLER, *Clerk.*

(Here follow maps marked pp. 528, 529, 530, & 531. Those marked pp. 529, 530, & 531 are not reproduced, all four maps being alike.)

Endorsed on cover: Case No. 13,787. Colorado supreme court. No. 195. A. R. Bushnell, John G. Clark, Adolph Nathan, Joseph Nathan, John Schreiner, Fred. J. Miller, and A. A. Bock, plaintiffs in error, *vs.* The Crooke Mining and Smelting Company. Filed October 16, 1889.

148 US 682

Office Supreme Court U. S.
FILED.
MAR 28 1893
JAMES H. MCKENNEY,
CLERK.

Brief for Plaintiffs in Error.

Case No. 13,787.

SUPREME COURT of THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 195.

A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, JOSEPH NATHAN, JOHN SCHREINER, FRED J. MILLER, AND A. A. BOCK, PLAINTIFFS IN ERROR,

vs.

THE CROOKE MINING AND SMELTING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

A. R. BUSHNELL,
Attorney for self and Co-Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 195, CASE NO. 13,787.

A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, JOSEPH NATHAN, JOHN SCHREINER, FRED. J. MILLER, AND A. A. BOCK, *Plaintiffs in Error,*

vs.

THE CROOKE MINING AND SMELTING COMPANY, *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF COLORADO.

BRIEF FOR PLAINTIFFS IN ERROR.

This is an action of ejectment brought by the defendant in error in the District court of Hinsdale county, Colorado, for a part of a mining claim on Ute mountain, in Galena mining district, in that county. The plaintiffs in error applied for a patent of their "Monitor Lode." The company defendant in error adversed them, claiming a part of the Monitor surface ground as belonging to its "Annie Lode," and brought this action in support of such adverse claim.

The company, plaintiff there, had judgment in that court, from which defendants appealed to the supreme court of Colorado, which affirmed the judgment ap-

pealed from, and the defendants have sued out this writ of error.

The question in the case is, what does the statute U. S. R. S., sec. 2320, mean by the words "veins or lodes," upon which it provides mining claims may be located? What constitutes a mineral "vein, lode or ledge," the exclusive right to which may be acquired by a locator under section 2322? If a locator by a first location, locates his vein or lode discovered, so as to secure continuous lode matter in place running along substantially through the center of his surface ground in the same general direction, and so that the extension of his end lines will include between them all his surface ground, may he hold the lode so located and his surface ground staked correspondingly; or may he be ousted of some of the lode so located, by an adverse claimant who locates upon a part of it inside his surface ground, and finds witnesses to swear they believe the *vein* upon which his discovery shaft is sunk runs out through one of his side lines at a point more than 150 feet away from the part so claimed adversely, and gets a jury, under instructions of the court, to say they believe that is true? The key to the case is the meaning of the words, "vein, lode, or ledge," as used by the statute.

No question is raised but that the Monitor is the prior location, and that it was duly located and worked in manner and form to hold the ground in question, as represented on the map Exhibit "Z," (Record, p. 272), unless the Annie Lode is entitled to that ground.

On this map the boundaries of each lode represented, are drawn in the same color as its name.

The ground in question is all that portion of the Monitor surface ground lying within the boundary lines of the Annie Lode, as drawn on the map.

The whole fight of the plaintiff company was as to where the Monitor *vein* runs from the discovery shaft "B."in the center of its sharpest angle, down the mountain southwesterly towards Henson Creek.

No contest whatever was made in this case, as to where it runs from the discovery shaft up the mountain northerly.

It was, and is, conceded on both sides, that there is a vein running from the Monitor discovery shaft down to the crossing of the line drawn to the southwest from the "Enterprise Shaft," as marked on the map; that from that crossing there is a vein running southwesterly into cut "O." as marked on the so-called Annie Lode, and into that lode, if not across it; and that from the point where such vein so strikes the Annie, there is a vein running down substantially as marked on the map for the Annie Lode. This makes continuous vein matter from the Monitor discovery shaft down the mountain substantially through the center of the Monitor surface ground as staked, and is what the defendants, now plaintiffs in error, claimed, and now claim, as their Monitor Lode in that direction.

The contention of the plaintiff company, now defendant in error, is, that the lode or vein matter, so running from the Monitor discovery shaft down through the center of the Monitor surface ground, is made up of three separate veins, viz.: That from the discovery shaft to the Enterprise crossing, it is a part of the Monitor; that from there to the Annie, it is a part of the Enterprise, and the rest of the way, it is the Annie vein; and that the true Monitor vein, runs from the discovery shaft, off through the southeast Monitor side line, down along the line "C." "D," to a junction with the Ule Lode, as marked on the map.

The contention of the defendants was, and is, that there is no vein at all running from the point of the alleged crossing of the Monitor Lode by the Enterprise, down along the line "C." "D." through the Monitor's southeast side line, as marked; but, that whether so or not, the fact that there is a plain continuous vein from that alleged crossing, diverging only a little to the right as you go down the mountain, and running into the alleged Annie vein, which then diverges only a little to the left, entitled the locator of the Monitor, to locate as he did, those slightly diverging so-called Enterprise and Annie veins, as a part of his Monitor *Lode*.

There was no conflict in the testimony, except upon the question as to whether or not, the Monitor vein ran off through the southeast Monitor side line, as claimed by the plaintiff company. As incident to this question, there was also a conflict as to whether the so-called "Enterprise Shaft," was sunk upon any vein at all; defendants claiming, and their witnesses testifying, that it was upon nothing, but a spur of the Moninor vein, and plaintiff claiming, and its witnesses testifying, that it was on a separate and distinct, and younger vein, which ran down and cut through, across both the Monitor and the Annie veins.

The exact point in the case is, was the Monitor Lode so located as to entitle the defendants, now plaintiffs in error, to the ground in question?

Under the instructions of the court, the jury returned a general verdict for the plaintiff company. The defendants moved the court to set it aside on various grounds, including the errors relied on here, and grant a new trial, which the court refused to do, and defendants duly excepted. Judgment was entered for the plaint-

iff, in form defective, because it did not specifically describe the premises adjudged to be recovered.

The defendants appealed to the supreme court of Colorado, which held the *form* of the judgment below to be erroneous, but affirmed the judgment in favor of the plaintiff company, and directed the exact form in which it should be entered.

The errors relied on are: 1st. The misdirection of the court to the jury. 2nd. The refusal of the court to instruct the jury as asked by the defendants. 3rd. The general verdict is against law and the evidence.

I.

The misdirection of the court to the jury.

The court at plaintiff's request instructed the jury in effect, that if the plaintiff's contention was correct, that the particular *vein* upon which the Monitor discovery shaft was sunk ran from that shaft off through the southeast Monitor side line along "C." "D." the plaintiff was entitled to recover.

This is clear from the language of the following instructions given, and to the giving of each of which the defendants duly excepted. In No. 8 (Record, p. 233), "The discoverer, when his location is complete, has the right to the enjoyment and possession of all veins or lodes within his boundary lines when their tops or apexes are within these lines, but this right to the enjoyment and possession of other lodes than the one located, depends upon their being within 150 feet of the center of his located *vein* and the located *vein* must not have departed from the side lines in its course. If it

does, the locator has no right to other lodes which are formed within his claim beyond the point at which the located *vein* departs from his side lines, even though they may be nearer than 150 feet to the vein after it leaves the side lines. In other words, the right of possession and enjoyment of other lodes than the one located and discovered, depends upon their being found at a distance of 150 feet or less from the centre of the *vein* discovered and located and upon the located *vein* being within the side lines of the claim as located."

In No. 9 (Record, p. 234). "The principal point in controversy is, upon what *vein* was the Monitor claim located, or what is the course of said *vein*. The defendants allege and seek to prove that the location was made upon a *vein* which runs from the discovery shaft of the Monitor, across and toward the *vein* upon which the Annie claim was located, while the plaintiff asserts and seeks to prove that the location was made upon a *vein* which runs from the Monitor shaft down and nearly parallel with the Annie lode, and which empties into or connects with the Ule lode.

"This is the principal point, in controversy, and to determine which claim is best supported by testimony and reason, is the province and duty of the jury. If the jury should believe from the testimony that the Monitor *vein* runs from the discovery shaft into the Ule *vein*, as claimed by plaintiff, and as shown upon the accepted plat of the various claims, then the verdict of the jury should be for the plaintiff."

In No. 11 (Record, p. 235). "If the location is properly made the locater may hold so much of the cross-vein as lies within 150 feet of the course of the located *vein* upon each side thereof, but no more. It is the *vein* upon which the location is made, that determines the

right of the locator to the surface ground and the *veins* within it, and not the cross-vein, although the cross-vein might be richer and stronger than the one upon which the shaft was sunk."

Instruction No. 13 (Record p. 235) ."If the jury should believe from the evidence that the *vein* which runs across from below the Monitor discovery shaft towards the *vein* upon which the Annie discovery shaft is sunk, and which defendants claim is a part of the Monitor *vein*, crosses and continues beyond the *vein* upon which the Monitor discovery shaft is sunk, and into and beyond the Enterprise shaft, then that *vein* is not the Monitor *vein*, and the location is not made upon it, and if the Annie *vein* is more than 150 feet distant from the true Monitor *vein* in its course through the several claims, the defendants cannot recover."

Instruction No. 14 (Record, p. 236). "The fact that a *vein* cannot be traced or seen in all its course, upon or a short distance beneath, the surface of the mountain, does not destroy its character as a *vein*, nor does it give to a locator the right to take up and occupy some other *vein*, because of its near proximity to the one which cannot be seen or traced, in all its course. The law contemplates that but one *vein* shall be located upon,—and the rights of the locator within his claim, depend upon the particular *vein* located and no other."

The error in these instructions is, that they ignore the existence of the word "lodes," as used in Sec. 2320, and "lodes and ledges," as used in Sec. 2322, R. S., U. S., or else they regard them as entirely synonymous with the word "veins" as there used.

The United States statutes, the construction of which is involved, are as follows:

"Section 2319. All valuable mineral deposits in lands

belonging to the United States both surveyed and unsurveyed, are hereby declared to be free and open, to exploration and purchase, and the lands in which they are found to ocupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

"Section 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines to each claim shall be parallel to each other."

"Section 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim

exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with the state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all viens, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically," etc.

It is conceded that mining claims in this mining district are limited to 1,500 feet in length and 150 feet on each side of the center of the vein or lode.

The language of section 2320 is, "Mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits," shall be governed, etc.

The exclusive possessory rights granted by section 2322, are to the locators of all mining locations made on any "mineral vein, lode or ledge."

The term "lode" as here used means quite another thing from "vein" or fissure. If it did not, its use in this connection would be superfluous.

Its legal construction, as used here, is much broader than its geological definition, and is "that formation by which the miners could be led or guided. It is an alteration of the verb lead; whatever the miner could follow expecting to find ore was his lode," or lead. "Some formation within which he could find ore, and out of which he could not expect to find ore, was his lode. The term lode-star, guiding star or north star, is of the same origin.

Eureka Con. M. Co. vs. Richmond M. Co. 4, Sawyer, 302.

Wades Amer. Mining L., 30.

"Struck a *lead*." He has "struck a *lead*;" that is, found that which the miner may follow and own whatever it may lead him to, was always a familiar expression among the miners of the lead mining regions of Illinois, Wisconsin and Iowa, and was doubtless carried by them to California when they flocked thither; and, slightly modified in form, its significance seems to have been retained in the great outgrowing mining regions of this country.

The definition of the word "lode" as used in these sections has long been settled by Eureka Con. M. Co. vs. Richmond M. Co. 4, Sawyer, *supra*, and cases following and approving it.

But if it had not been, the scope and meaning of the statutes is plain. The language of Sec. 2319 is, "All valuable *mineral deposits* in lands belonging to the United States * * * are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase." The language "mineral deposits," is at least co-extensive with "ore deposits," and includes any natural occurrence of ore of economically valuable metalliferous material, whatever may be its form or extent; a metalliferous deposit. This section followed by the provisions of section 2320, for the governance of mining claims upon "veins or lodes of quartz or other rock in place bearing gold, silver, cinnibar, lead, tin, copper, or *other valuable deposits*;" and the latter followed, as it is, by the provisions of section 2322, granting to "the locators of all *mining locations* * * * made on any mineral *vein, lode or ledge*, * * * the exclusive right of possession and enjoyment of all the *surface* included within the lines of their locations, and of all *veins, lodes and ledges*," throughout their depth inside of such sur-

face lines, etc., makes it very clear that the right of location here intended to be given, was not merely that of locating some variety of *vein*, but was meant to be broad enough to cover all the "*mineral deposits*" which Sec. 2319, granted citizens the right to explore for, and purchase the public lands in which they found them.

The word "lode" in mining, is defined to mean, "a metalliferous deposit having more or less of a vein-like character—that is, having a certain degree of regularity, and being confined within walls." See Century Dictionary.

The word "ledge" in mining, "is a common name in the Cordilleran region for the lode, or for any outcrop supposed to be that of a mineral deposit, or vein."—Century Dictionary.

Even these mining meanings, clearly go far beyond the "*vein*," a single fissure, crack or cleft, but *one* of which the instructions given say, "the law contemplates * * * shall be located upon, and the rights of the locator within his claim depend upon the *particular vein* located and no other." Such is the language of instruction 14, aforesaid.

These instructions of the court to the jury are erroneous in that they confine the rights of the locator in locating his lode discovered, to much narrower limits than is intended by the statutes.

This, if possible, is made more plain by a consideration of,

II.

The refusal of the court to instruct the jury as asked by the defendants.

The court being requested by defendants to give the jury each of the following instructions, refused to do so, and the defendants duly excepted.

"13th. The court charges you that a prospector in locating his vein, is not required to follow it through a fault, or other obstruction which interposes solid country rock in its course, but in such case he may follow with his location any vein that continues on from the point of such obstruction, in the general course of his original vein." Record, p. 241, F. 464.

"15th. The court charges you that if a prospector in locating his lode discovered, by a first location secures continuous vein matter substantially along through the center of his surface ground in a continuous general direction, and so that the extension of his end lines will include between them all of his surface ground, he will hold the same and every part thereof, against all subsequent claimants." Record, p. 241, F. 464.

"19th. This court charges you that there is no question in this case as to the rights of contesting claimants to any cross or uniting lodes." Record, p. 241, F. 464.

"21st. If the defendants are entitled to anything as claimants of the Monitor lode, they are entitled to the Enterprise discovery shaft, and all the rights that attach thereto or to the so called Enterprise vein, within their surface ground." Record, p. 241, F. 465.

These instructions we insist are good law applicable to the facts, and ought to have been given. In refusing the first two the court held the converse of those

instructions to be the law, viz: That a prospector in locating his lode, must follow his original *vein* discovered, wherever it runs, even through a fault or other obstruction, which interposes solid country rock in its course, and that he cannot on meeting such obstruction, follow with his location any *vein* that continues on from the point of such obstruction, in the general course of his original vein.

Also, that it is not sufficient for a prospector, in locating his lode discovered, by a first location to secure continuous vein matter substantially along through the center of his surface ground, in a continuous general direction, and so that the extension of his end lines, will include between them all of his surface ground. And that this is not sufficient to enable him to hold his such lode and surface ground and every part thereof, against all subsequent claimants

That the court held such to be the law, is made clear by the instructions given, as hereinbefore set forth, as well as by these refused.

The 19th and 21st instructions refused were correct, and ought to have been given. All the testimony agreed that the Enterprise discovery shaft was within thirty feet of the Monitor discovery shaft. There was nothing to show that the so-called Enterprise lode was ever legally located, and the court instructed the jury that there was no evidence that it belonged to anybody else that the defendants.

III.

The general verdict is against law and the evidence.

The undisputed facts shown on the trial in the District court are as follows:

The Monitor Lode was located in 1875, by C. F. McConkey and Wm. Phillips, and location certificate thereof, made, and duly recorded, June 28th, 1875.—See Record, p. 222, No. 181, Location Ctf.

The plaintiff questioned the sufficiency of this location certificate, claiming that it did not so describe the Lode by reference to some natural object or permanent monument, as to identify it with reasonable certainty.

Whether or not, it did so describe the Lode, was by the Court, submitted to the jury for their special verdict, and they found that it did. Record, p. 242, Folio 467.

All the other steps to make a valid location, in form, were duly taken, and before 1877 the discovery shaft on the lode was sunk to the depth of some forty to fifty feet.

Early in 1877 the defendants became the owners of the lode by purchase and conveyance from McConkey, who had previously bought out Phillips.

The boundary stakes were then all standing.

The deeds from the locators of the Monitor Lode to the defendants are found in the Record, p. 222 to 232, inclusive.

On June 14th, 1877, the defendants had made an accurate survey of the lode, and new boundary stakes set, retaining the places of the old boundary stakes where they then stood, so far as they could do so, and yet make the boundaries of the lode symmetrical, accord-

ing to government rules, and re-located the lode by a new certificate duly filed and recorded August 6th, 1877. Record, p. 223 and 4.

In making this survey and re-location, the places of the original Southwest and Northeast corner stakes, were retained exactly. The positions of the other stakes were necessarily somewhat changed to make the end lines parallel and the side lines parallel.

No question is raised, that the defendants did not each year do the required amount of annual assessment work.

The "Annie Lode," as shown by the map, Exhibit Z, (Record, p. 272), is claimed to have been located October 12, 1878. Its discovery shaft, "C," it will be seen is within the boundary lines of the Monitor Lode, and it assumes to claim about one-half of the surface ground of that Lode.

Two trials were had in the district court. On the first, many witnesses were sworn and testified on both sides as to the course of the Monitor vein, and the jury disagreed. On the last trial the number of witnesses on this point was by agreement limited to seven on each side.

The dip or pitch of the Monitor lode is about twenty degrees from a perpendicular to the northwest, into the mountain.

There was no conflict in the testimony as to the fact of there being continuous lode matter in place, running from the Monitor discovery shaft "B," down along substantially through the center of the Monitor surface ground as staked to the southwest, into the east end of the cut "O," and into what is claimed as the Annie lode, and thence along down with that lode.

All of the defendant's seven witnesses, and most of

the plaintiff's, agreed that in their judgment, a drift or tunnel could be started in the bottom of shaft "B," just below the discovery shaft "C," on the so called Annie vein, and run up the mountain substantially along through the centre of the Monitor surface ground as staked, continuously on lode matter into the Monitor discovery shaft "B." The plaintiff's witness, John J. Crooke, however, and one or two others thought there might be some faults, or some pinching out on the way; but these, it is well settled, would not in law, interrupt the continuity of a lode, as located. There was no testimony whatever to the contrary.

The plaintiff's witnesses thought that in its course, such drift or tunnel would have to be run on three separate veins, viz.: The Annie, the Enterprise and the Monitor veins. The defendant's witnesses thought it would be all the way on the Monitor vein.

The Enterprise vein, the plaintiff claimed to be one running through the "Enterprise shaft," as marked on the map "Z," about thirty feet easterly from the Monitor discovery shaft, as indicated by the black line there in Exhibit Z., down across the Monitor as plaintiff claimed it to run, into the east end of cut O, and across the Annie vein, as indicated by the black line just below O.

Who located, and claims to own, the "Enterprise Lode," does not appear from the record. As a matter of fact, however, it is claimed to have been located May 19th, 1879, and is another adverse claim filed by the same plaintiff against the Monitor lode, to establish which, another action is now pending in the district court of Hinsdale county. The defendant's witnesses thought it was not a vein, but only a spur of the Monitor. Whether so or not, we do not think material.

The theory of the plaintiff, as to the facts, is, that the Enterprise is a younger vein, was formed at a later date, than either the Monitor, or the Annie, and cuts across both of them.

The principal conflict in the testimony was, whether or not there was any vein at all, running from the point where the plaintiff claimed the Enterprise lode crosses the Monitor lode, down along the line "C," "D," into the Ule. The defendant's witnesses all testified that in their judgment there was no vein there, neither the Monitor nor any other.

The testimony of the plaintiff's witnesses on this point, was generally in effect, that in their judgment, the Monitor vein runs from the discovery shaft down that line C. D. to a junction with the Ule; but that there is a fault in it, or it is capped over, for some distance toward the Ule, next below where the line from the Enterprise shaft crosses it.

John J. Crooke himself, when asked the direct question as to what he thought was the matter that the Monitor vein does not appear here just below where the Enterprise crosses it, and whether he don't think there is a fault in it there, testified as follows: "No sir, I don't know. I think it has been shoved, and that would amount to a fault; but I am not positive of that either. There has been an overflow of igneous rock there." Record, p. 156, Folio 292.

He is all uncertainty about how the Monitor vein gets through there just below the Enterprise crossing along down "C," "D," towards the Ule, and admits that for 25 or 30 feet next below that crossing down that way, the vein has never been found. Folio 293. And there was no witness who pretended to know any more about how the Monitor vein got through there and on down

to a junction with the Ule, than did Crooke himself, although he and most of his six other witnesses on that subject, were positive that it did get through there in some way.

J. W. O'Brien, plaintiff's witness, thinks that the displacement of the Monitor vein just below that crossing, extends down 1,000 feet in depth. Record, p. 131, F. 229. And just back of that he agrees with Crooke that the vein does not appear for 25 or 30 feet down from that crossing towards "C," "D."

And nobody testifies to the contrary.

That the plaintiff company's theory and proof in the district court was, that the Enterprise vein was a younger vein, and cuts across both the Monitor and the Annie, is clearly shown by the testimony of their witnesses as follows:

J. W. O'Brien, p. 125-6, Folio 219. Also F. 216 and 220.
J. K. Mullen, p. 138, F. 260-261.
Joseph Simonds, p. 143, F. 271.
John J. Crooke, p. 152-3. Younger vein, F. 287.
C. L. Harpin, p. 161, F. 300.
James W. Abbott, p. 165-6, F. 307-8.

This necessarily made a connecting locatable vein, between the point of the claimed Monitor and Enterprise crossing, down into the Annie.

Under this state of facts it is insisted, that the law will not permit a jury to find as they did under the instructions of the court, that the Monitor Lode ought to have been located through just below that claimed Enterprise crossing, where there was a fault in it, or it was capped over, and it surely did not appear, and has never yet been found for at least 25 or 30 feet; and that from

the point where it met such obstruction, if in truth it does run down along "C," "D," it could not be legally located ahead on the plain lode matter and vein continuing from that point on down the mountain according to all the evidence, as it was staked.

To hold otherwise, will open a door for the entry of disputes that will utterly destroy, about every mining-claim that anybody sees fit to get up a fight about. The facility with which experts of all classes and degrees, may be found to support almost any theory is well known to every lawyer.

How fighting theories about mining-claims, may be started, shifted to meet new developments of facts, sustained and helped out by *mining* expert testimony, is well illustrated in the present instance.

The Monitor Lode duly located near the great Ute and Ule lodes in 1875, sufficient work done on it and patent applied for, is wanted. It is adversed with the Annie and the Enterprise, both over three years later in date of location, and the discovery shafts of both sunk on its surface ground. The first theory upon which the Annie location is sought to be sustained is, that there is no vein at all running down the mountain to the southwest through the centre of the Monitor surface ground, as it was staked. But the defendants began stripping off the accumulated soil and debris down to bed rock, in that direction, disclosing a plain vein as fast as stripped. At succeeding stages of the stripping the theory of the plaintiff company changes to making the vein shown turn off to the left as indicated on their map, (which is the one in the record), and thence down into the Ule. But as the stripping progresses and it becomes absolutely certain that there is a vein running down the

mountain substantially through the Monitor surface ground as staked, they jumped to the theory that that is the Enterprise vein, and no part of the true Monitor vein, and that therefore it could not be located as any part of the Monitor Lode; and that the only direction in which the Monitor Lode could have been legally located, was from the Enterprise crossing, through a fault, and where it was capped over with solid igneous rock, down along the line "C." "D."

The contest thus raised, pushed as fast as possible by the defendants, now plaintiffs in error, has been going on for over twelve years, and is now here in the highest court of the land. How much longer it may run, and whether mining-lode claimants under the United States statutes, in like cases, can have and hold anything of practical value, depends largely on the decision here.

The intricate and much involved connections of metalliferous veins, fissures and deposits, big and little, in the great mining localities like Ute Mountain, with their invariably attending junctions, dividings, faults, cap-overs, pinchings out, splits, horses, angles, dips and spurs, crossings and intercrossings, make the rule enforced by the district court an impracticable one. The company's map in the record shows some of the numerous lode locations in that locality.

On the trial a small map of the different lodes claimed in that immediate vicinity by the plaintiff company, testified to by the witness Crooke (record p. 157, F. 295), and by the company's witness, James W. Abbott, was offered in evidence by the defendants, and ruled out on plaintiff's objection, and they excepted. (Record, p. 167, F. 310–311.) The endorsements and filing of this map are shown in the printed record, page 232–3, F. 449, but the map itself

seems to be missing. We have had an exact copy of that map, which appears in the abstract of the record used in the Colorado Supreme court as Exhibit No. 9, printed as the last leaf of this brief. The lodes there represented are plastered over and cover every foot of the Monitor, besides interlapping upon each other. It omits the Monitor and other lodes testified about by various witnesses as being on that same ground.

It is a fair illustration of how lodes may criss cross, and run into each other, in like localities, and of the utter impossibility of any one crack in the earth's crust filled with rock carrying mineral deposits, which constitutes "*a vein,*" being located there, for a distance of 1,500 feet, so that any human being could say that throughout that distance he knew it was one and the same *particular crack.* Even after the paying mineral in those cracks had been worked out for hundreds of feet in depth, so that the experts on either side of a contest might pass through them and inspect their exposed complications, upon the parts exposed to sight as well as upon the barren and unexposed, they would have many diverse and conflicting views; and in such localities, under the rules of the courts below in this case, the determination of the rights of contesting claimants must be the subject matter of a mere arbitrary guess, or worse, governed by no fixed or certain rule.

SOME UNCONTESTED GROUND RECOVERED.

Judgment was given and affirmed, and directed by the supreme court to be entered for the recovery of all that portion of the Monitor surface ground lying within the boundaries of the Annie Lode. See testi-

mony of plaintiff's witness Abbott, Record, p, 34, F. 63. This includes a large portion of the Monitor surface ground, even upon the theory of the plaintiff company.

By that theory the Monitor vein runs from the discovery shaft down the line "C." "D." This would certainly entitle the Monitor owners to hold a strip of ground 150 feet wide to the right of that line, from the discovery shaft down to the point where that line cuts through the southeast Monitor side line. As will be seen on the map by the figures below the dotted line at that point, the Annie boundary line is only 136 feet distant from that point. This leaves that 150 foot wide strip of Monitor ground, overlapping the Annie side line opposite that point, 14 feet. The figures under those successive dotted lines, which are 50 feet apart, from thence northwardly, show that same overlapping to continue in that direction as follows, viz.: 5 feet, 0 feet, 6 feet, 10 feet, 17 feet, 9 feet, and at the discovery shaft, which is between two of those dotted lines, about 10 feet. From the Monitor discovery shaft northwardly on the basis that the Monitor vein continues in that direction as marked on the map, that same overlapping of the 150 feet wide strip continues to the upper end of the Monitor Lode as follows, viz.: 11 feet, 10 feet, 9 feet, 10 feet, 10 feet, and at the north end of the lode, though not marked, it cannot be less than 10 feet.

And right there, let it be borne in mind, that 10 feet reaches over and takes in longitudiually for some distance, the great Ute vein, as testified by the company's witness, Abbott, who made the map. Record, p. 33, F. 62. He says shaft "J." at that point is unquestionably on the Ute vein.

Such overlap of that 150 foot wide strip belongs to the defendants even upon the plaintiff company's own theory. That overlap is 600 feet long and averages a little over 10 feet wide.

Further, no contest was made as to where the Monitor vein ran from the discovery shaft northwardly up the mountain. No witness testified that in their judgment there was not a vein running from the discovery shaft up the mountain, substantially through the center of the Monitor surface ground in that direction. And the court charged the jury that it was "of no consequence where the Monitor lode runs up the mountain from the discovery shaft, except so far as that may help you to determine where it runs from the discovery shaft down the mountain." Record p. 240, F. 462, Instruction 17.

And yet the judgment of recovery given, and affirmed and directed to be entered by the Colorado Supreme court, takes in the piece of ground nearly a triangle in the northwest Monitor corner, included within the Annie boundary lines. The ground recovered, if any, upon the plaintiff company's theory, should not have extended northwardly of a line drawn across the Monitor ground through its discovery shaft and between the most acute angles of its side lines.

COLORADO SUPREME COURT DECISION.

The supreme court of Colorado recognize the issue submitted by the district court to the jury, as stated in the ninth and thirteenth instructions asked by the plaintiff company and given; and affirm the error of that

court in respect thereto. These substantially include the other misdirections complained of.

See their opinion, Record, p 255, Folio 492 to end of opinion.

After disposing of all the other points, they say, "The controlling issue in the case, we think, was fully understood by the jury and was clearly stated by the court in the ninth instruction, viz.: "The. principal point in the controversy is upon what *vein* was the Monitor claim located, or what is the course of said *vein*. The defendants allege and seek to prove that the location was made upon a *vein* which runs from the discovery shaft of the Monitor across and towards the *vein* upon which the Annie claim was located, while the plaintiff asserts and seeks to prove that the location was made upon a *vein* which runs from the Monitor shaft down and nearly parallel with the Annie Lode and which empties into or connects with the Ule lode."

"This is the principal point in controversy, and to determine which claim is best supported by testimony and reason is the province and duty of the jury."

"Instruction No. 13 was as follows: "If the jury believe from the evidence that the *vein* which runs across from below the Monitor discovery shaft towards the *vein* upon which the Annie discovery shaft is sunk, and which the defendants claim is a part of the Monitor *vein*, crosses and continues beyond the *vein* upon which the Monitor discovery shaft is sunk and into and beyond the Enterprise shaft, then that *vein* is not the Monitor *vein*, and the location is not made upon it, and if the Annie lode is more than 150 feet distant from the true Monitor *vein* in its course through the several claims, the defendants cannot recover."

This 13th instruction given at the request of the plaintiff company, recognizes the fact that there *is* a vein running across from the point of the claimed crossing of the Monitor and Enterprise veins, towards the Annie, and which they claim to be the Enterprise vein, and not the Monitor.

The existence of that connection, as conceded by both parties, is clearly recognized by the Colorado Supreme Court. See folio 494, where they say, "The lines on the map representing what appellees claim to be the Monitor and Enterprise lodes cross each other, showing at the place of crossing a figure something like the letter X. At the top of the right upper horn of the figure is where the discovery shaft of the Enterprise appears, and at the top of the left upper horn of the figure is where the discovery shaft of the Monitor appears."

"As to the lode or lodes represented by the two right horns of the figure there was conflicting evidence as to the existence of any lode there, and that there was nothing of the lode character there, was claimed by appellants and testified to by appellant's witnesses, while the contrary was claimed by appellee and testified to by appellee's witnesses."

"As to the lode or lodes represented by the two left horns of the figure, there was no dispute as to the lode character thereof, both parties conceding and maintaining the same."

"Appellants claiming that the same was the Monitor lode and that there was no other lode there, except possibly a branch or spur extending up towards the discovery shaft of the Enterprise, and appellee claiming that there were two lodes there, viz.: the Monitor and

the Enterprise, and that they crossed each other there, as indicated by the figure."

And that court say that the instructions given, leave these two questions to the jury, viz.:

"First. Does this lode across from below the Monitor discovery shaft, running towards the Annie, extend up to and beyond the said Enterprise discovery shaft?"

"Second. Does it cross the Monitor lode in its course; in other words equivalent thereto, does the Monitor lode cross it?"

The court think these questions presented the real issue in the case. They say they see, "nothing in the record to warrant a reversal of the judgment given; that it should be affirmed and the case remanded with direction to enter judgment according to the views herein expressed."

Exactly what they did, was to affirm the judgment of the district court, and correct the form of its *entry* as set forth in their opinion. See Record, p. 253-4, F. 489-490.

Their opinion makes no reference to the point fully argued before it by appellant's counsel, that the district court erred in refusing to instruct the jury as asked in defendant's instructions 13 and 15. They evidently thought there was no error about such refusal. And just as clearly they held that the verdict was not against law and the evidence.

We insist that under the U. S. statutes, the locator of the Monitor lode was not required to locate it from the alleged Enterprise crossing down the line "C." "D." It is clean, solid, igneous rock there and no dirt or debris to obstruct examinations. No vein or lode has ever been discovered through there, which the locator of

the Monitor could follow. None can be seen, and whether or not there is one there, capped over, as shown by the testimony of every witness who thinks there is anything there, is a mere matter of conjecture.

While it is clear that a prospector, in locating his lode discovered, has a right to locate it through a pinching out, and through a fault which interposes solid country rock in its course, *when he discovers that it so runs*, yet we submit that it cannot be properly held, that he *must determine whether it does so run*, before he can follow with his location, plain vein matter continuing on in a slightly diverging direction from the point of such obstruction.

The special verdict disposed of the only material issue in the case. Under the law and the evidence, a general verdict should have been directed for the defendants.

Applying the law and evidence and the special verdict, it cannot be said that there is anything tending to controvert these facts:

1st. The Monitor Lode was duly located in all respects, long previous to the attempted location of the Annie.

2nd. Its locator secured continuous lode matter in place from the discovery shaft down southwardly substantially through the centre of its surface ground as staked, and the presumption is that he did so up northwardly.

3rd. There is no known or discovered continuous vein or lode matter from the discovery shaft down the mountain in any other direction; and especially that there is, or may be a vein continuing from the intersection of the so-called Enterprise Lode with the Monitor, down the line C. D. towards the Ule, is mere conjecture.

4th. There is no question about the annual assessment work on the Monitor having been done.

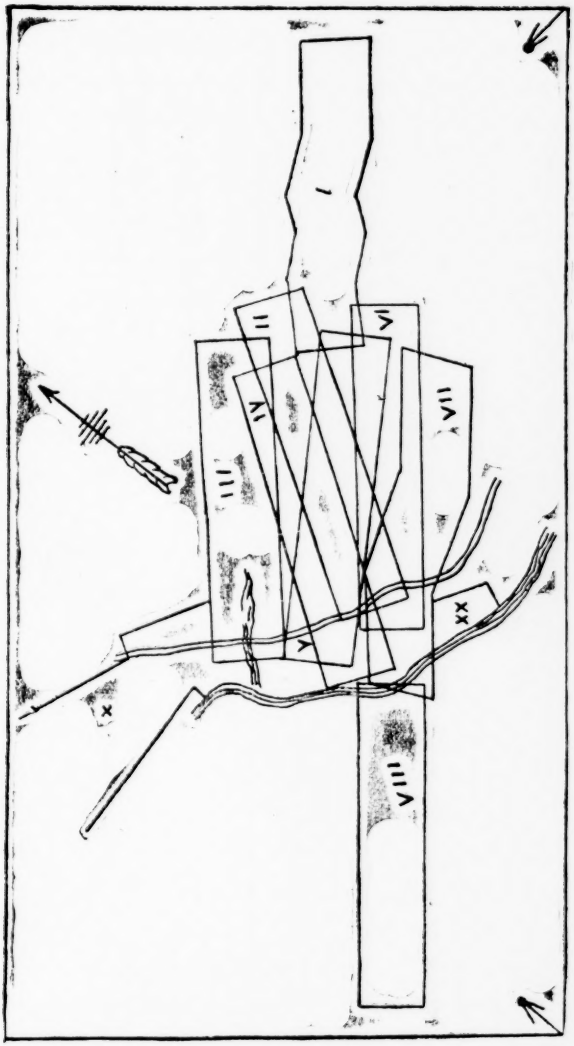
5th. The defendants are the proper grantees of the original locators of the Monitor.

6th. The Annie Lode was attempted to be located by a discovery shaft sunk upon Monitor surface ground, upon a lode properly staked as a part of the Monitor lode, and was a trespass.

We most respectfully submit that the judgment brought up for review should be reversed.

March 21st, 1893. A. R. BUSHNELL,

For himself & Co-Plaintiffs in Error.



DEFENDANT'S EXHIBIT "No. 10"

EXPLANATION.—I Ute; II Necessity; III Bushnell; IV Annie; V Electric; VI Enterprise; VII Ulé; VIII Ulé Extension; X J. J. Crooke Placer Claim; XX Ulé Millsite. [Scale, 1 in., 800 ft.]

148 US 682

Office Supreme Court U. S.
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MAR 30 1893
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IN SUPREME COURT, UNITED STATES.

OCTOBER TERM, 1892.

No. 195.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

A. R. BUSHNELL, ET AL.,
Plaintiffs in Error,

vs.

THE CROOKE MINING AND SMELTING COMPANY,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR ON DEFENDANT IN ERROR TO DISMISS AND AFFIRM.

A. R. BUSHNELL,
Attorney for self and Co-Plaintiffs in Error.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 195.

IN ERROR TO THE SUPREME COURT OF COLORADO.

A. R. BUSHNELL, ET AL.,

Plaintiffs in Error,

vs.

THE CROOKE MINING AND SMELTING CO.,

Defendant in Error.

Brief For Plaintiffs in Error on Motion of Defendant in Error to Dismiss and Affirm.

The motion to dismiss and affirm is on seven grounds:

1. The bond given in aid of the writ is executed by plaintiffs in error by J. Warner Mills, their attorney in fact, and his power so to act does not appear in the record.

2. Because the record does not show that a justice of this court ever gave plaintiffs in error leave to file the transcript or has ever indorsed upon the transcript a request for the allowance of the writ.

3. Because the judgment and decision of the supreme court of Colorado, to which the writ is directed, was

not final; that court having reversed the judgment of the trial court with orders to it to proceed further as directed.

4. Because the record shows that the defendants in error once removed the cause to a United States court and the plaintiffs in error got it remanded back to the State court.

5. Because the record shows the existence of no federal question essential to give this court jurisdiction of the case under the 25th section of the Judiciary act, or any amendment thereof.

6. Because the plaintiffs in error did not assume to present any such question or assert its existence, prior to their petition for a re-hearing of the cause.

7. Because of other and further reasons, etc., not specified or argued.

I.

The bond given in aid of the writ is executed by plaintiffs in error by J. Warner Mills, their attorney in fact, and his power so to act does not appear in the record.

The bond is duly executed by two sufficient justifying sureties, in addition to plaintiffs in error, and duly approved by the chief justice of the Colorado supreme court. Record, p. 262, Folio 508, and p. 263, Folio 510–511. R. S., Sec. 999, provides that the chief justice of the state court may sign the citation, and Sec. 1,000 provides that "every justice or judge signing a citation, shall take good and sufficient security," conditioned to pay damages and costs as therein specified. The presumption is that the chief justice who allowed the writ and approved the bond, did his duty and saw to it that the bond was duly executed.

Martin vs. Hunter, 1 Wheat., 304.

The plaintiffs in error are estopped from ever denying the authority of their attorney to sign their names to that bond. They have proceeded with the cause in this court on the strength of its validity, and have thus ratified the authority of their attorney to execute it as he did. The defendant in error has relied upon its validity. Plaintiffs in error could never be heard to deny it. But that bond does not bind them any further than as parties to the action they are bound without it. They are responsible without any bond for all costs and damages in the action for unlawfully retaining possession of the lands, or otherwise occasioned by their management of the action.

But Section 1,000, directing a bond to be given, is merely directory to the judge, and omission to take it does not avoid the writ.

Martin vs. Hunter, Supra.
Anson vs. Blue Ridge R. R. Co., 23 How., 1.
Davidson vs. Laurier, 4 Wall., 447.
Seymour vs. Freer, 5 Wall., 822.

And the party may be allowed time to give the bond.
23 How., 1, and 5 Wall., 822, Supra.
Boobst vs. Boobst, 2 Wall., 96.

II.

Because the record does not show that a justice of this court ever gave plaintiffs in error leave to file the transcript, or has ever endorsed upon the transcript a request for the allowance of the writ.

The petition for the writ was duly allowed by Helm, Chief Justice of the Colorado Supreme Court Record. p. 261, F. 506.

See R. S. Sec. 1,000.

It might have been allowed by a justice of this Court, but was properly allowed by Helm, C. J.

Aldrich vs. Ætna Ins. Co., 8 Wall, 491.

Buell vs. Van Ness, 8 Wheat, 312.

It is enough that a bond was taken as required by Sec. 1,000. There is no law or rule requiring the writ to recite its own allowance, as counsel claims it should.

III.

Because the judgment and decision of the Colorado Supreme Court, was not final.

It is, "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had," that, "may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error." R. S., Sec. 709.

The statutory requisite in this respect, is not merely that the subject matter of such review, shall be, "a final judgment or decree." It must also be a determination, "in the highest court of a state in which a decision in the suit could be had."

This statute clearly does not mean a judgment as to which the last act possible in or about its completion has been had. Few such judgments are, or can be, entered by "the highest court of a state." The finality here intended is, the end of the litigation. The questions at issue must first be litigated as far as they can be in the state courts, and then, if a federal question is in the case, a review may be had in this court.

"The act (Sec. 25 of the Judiciary act) does not prescribe the tribunal to which the writ of error shall be directed. It must be directed either to that tribunal which can execute it; to that in which the record and

judgment to be examined are deposited, or to that whose judgment is to be examined, although from its structure it may have been rendered incapable of performing the act required by the writ."

"It may then be directed to either court in which the record and judgment on which it is to act may be found. The *judgment to be examined* must be that of the highest court of the state having cognizance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited and in which it may be found by the writ."

Gelston vs. Hoyt, 3 Wheat., 246.
McGuire vs. The Commonwealth, 3 Wall., 382.
Buel vs. Van Ness, 8 Wheat., 312.

Gelston vs. Hoyt, supra., seems to have been followed heretofore. In the case at the bar the writ found the record in the supreme court of Colorado and that court has sent it here. Had it been sent back to the district court before service of the writ, the supreme court could not have sent up the record and a writ must have been sued out to the district court. The writ had to be directed where the record was to be found, to avail anything.

The opinion of the Colorado Supreme Court written by one of the judges and signed by two more, making a majority of the court, is better evidence of what their judgment was, than the mere formal entry of judgment by the clerk, prepared perhaps by an attorney and recorded by the clerk.

The opinion distinctly refuses to reverse the judgment below, and just as distinctly affirms it. (Record, p. 256, F. 495.)

Exactly what was done about correcting an error in the judgment was this: The premises were adjudged

to be recovered without a sufficient description of them being in the judgment. The appellate cour said, "This was an erroneous entry of judgment and not according to the verdict and order of the court, as appellee was entitled thereupon to have it entered. Such error may be corrected by direction of this court."

Record, p. 253-4, F. 489-490.

And the court then directed the description to be inserted in the judgment and gave the exact metes and bounds.

Record, p. 256, F. 495, and 253-4, F. 489-490.

This amounts to a judgment by the Supreme Court of Colorado that cannot in any way be contested further in the courts of that state. It is the end of the litigation in the state courts.

In Aldrich vs. Ætna Co., 8 Wall, 491, the Court of Appeals of New York affirmed the judgment of the Superior Court of Buffalo, and in the opinion by Nelson, J., it is said, "the judgment was in fact rendered in the Court of Appeals." So in this case, the judgment was in fact rendered by the Colorado Supreme Court.

It cannot be presumed that the District Court will amend its judgment in a different way than that directed by the Supreme Court. Unless it should do so, another appeal or a writ of error up to that same Supreme Court, would be a piece of folly of which this court will not require anybody to be guilty.

IV.

Because the record shows that the defendants in error once removed the cause to a U. S. court and the plaintiffs in error got it remanded back to the state court.

How plaintiffs in error are estopped from asking legal relief from one federal court, because they objected to being taken illegally into another federal court, is pretty difficult to understand.

V.

Because the record shows the existence of no federal question essential to give this court jurisdiction of the case under the 25th section of the judiciary act, or any amendment thereof.

The final judgments of the highest state courts which may be reviewed here as provided by section 709, are those among others, " where any title, right, privilege or immunity is claimed under * * * * any * * statute of * * * * * the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party under such * * statute."

The origin of this litigation was, that plaintiffs in error applied for a patent of their Monitor lode, and the defendants in error adversed them, and brought this suit in support of their adverse claim. Both parties, specially and specifically, claimed the ground in question under the United States mining statutes, R. S., U. S. Title 32, Chapter 6, and there was, and is, no other basis for the claims of either. Under Sec. 2326 in that Chapter, this action had to be brought for the sole purpose of determining which of these adverse claims to right of possession and grant of title is the valid one, under those statutes. There was, and is, no other purpose or object in the bringing or contesting of the action, from beginning to end. A federal question was necessarily in the case, and to beat the plaintiffs in

error, it had to be, and was, decided wrong. The decision of the District court, affirmed by the Colorado Supreme Court, is against the title and right so claimed by the plaintiffs in error.

The case is therefore properly here.

Chambers vs. Harrington, 111 U.S., 350.
Harris vs. Dennie, 3 Peters, 292.
Davis vs. Packard, 6 id., 41.
Ocean Ins. Co. vs. Polleys, 13 id., 137.
Armstrong vs. Treasurer, 16 id., 281.
Mills vs. Brown, 16 id., 525.
Parmlee vs. Lawrence, 11 Wall, 36.
Commercial Bank vs. Buckingham, 5 How., 317.
Cockroft vs. Vose, 14 Wall, 5.
Ableman vs. Booth, 21 How, 506.
Maguire vs Tyler, 8 Wall, 651, and many other cases.

It doesn't matter that the Colorado Supreme Court attempted to dispose of the case on other grounds, if it did so erroneously.

Minnesota vs. Bachelder, 1 Wall, 109.
Rector vs. Ashley, 6 Wall, 142.

VI.

Because the plaintiffs in error did not assume to present any such (federal) question or assert its existence, prior to their petition for a re-hearing of the cause.

Neither the argument of counsel nor the opinion of the court below can be looked at to determine whether a federal question was raised.

Gibson vs. Chouteau, 8 Wall, 314.

But if they could be, the present writer refers to his printed brief and argument filed in the Colorado supreme court, wherein was raised and insisted upon, the exact questions now raised here.

Instructions 13, and 15, asked by defendants, now plaintiffs in error, and refused to be given to the jury, and the exceptions taken to the instructions given, and the grounds upon which a new trial was sought in the district court and in the Colorado supreme court, all show the insistance of the plaintiffs in error, upon their title and rights claimed under the U. S. Statutes as now claimed.

For further consideration of the federal question herein, and the error of the Colorado courts thereon, see brief and argument for plaintiffs in error in the case.

A. R. BUSHUELL,
For self & Co-Plaintiffs in Error.

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Office Supreme Court U. S.
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IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1892.

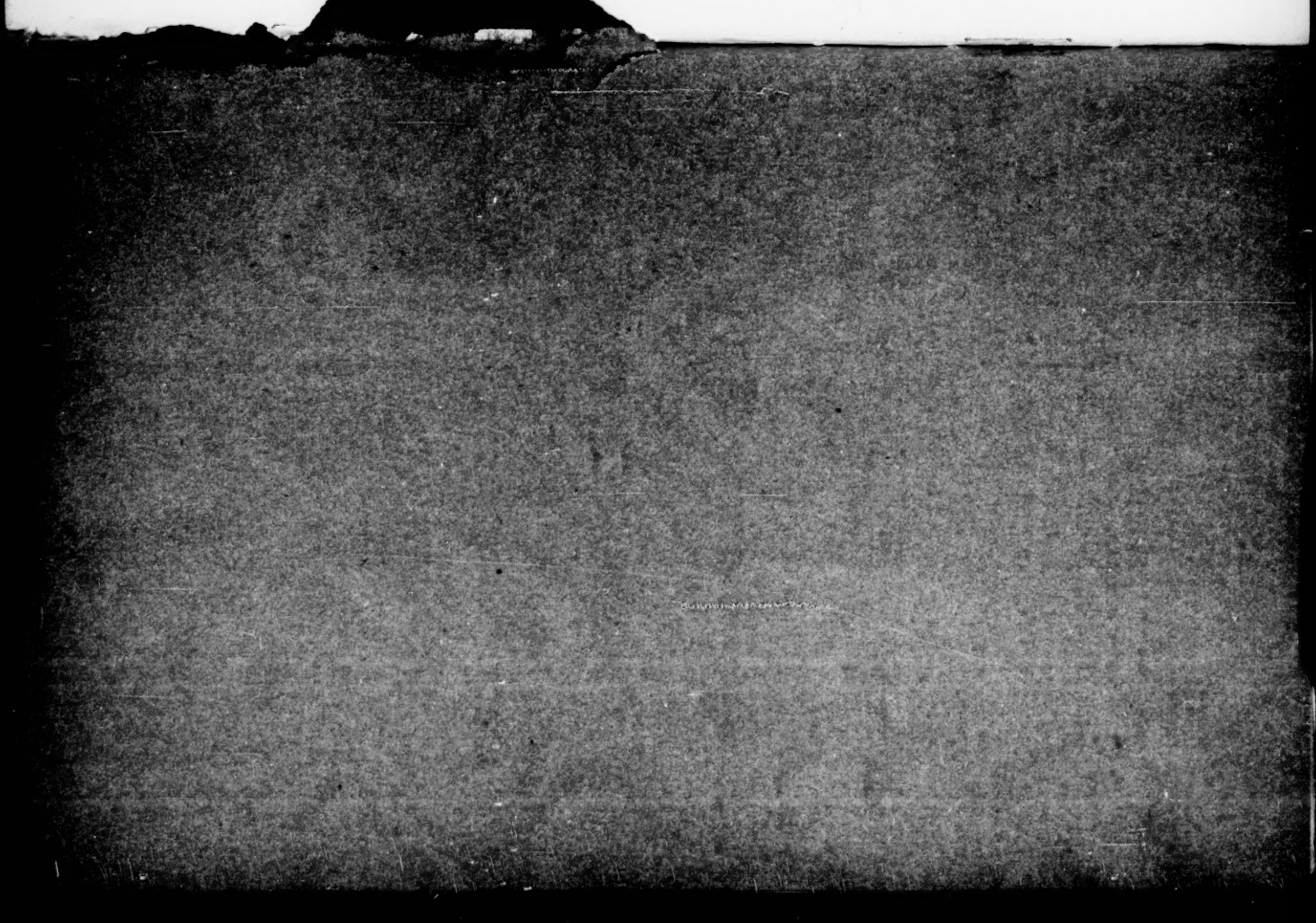
A. R. BUSHNELL *et al.*,
Plaintiffs in Error,
vs.
THE CROOKE MINING AND SMELTING COMPANY,
Defendant in Error.

No. 195.
Error to the Supreme Court of the State of Colorado.

Brief and Argument of Defendant in Error on Motion to Dismiss and Affirm.

C. S. THOMAS,
W. H. BRYANT,
Attorneys for Defendant in Error.

C. J. KELLY, Printer, Denver.



IN

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A. R. BUSHNELL *et al.*,
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THE CROOKE MINING AND SMELTING COMPANY,
Defendant in Error.

No. 195.
Error to the Supreme Court of the State of Colorado.

Brief and Argument of Defendant in Error on Motion to Dismiss and Affirm.

The defendant in error seeks to obtain a dismissal of this writ and an affirmance of the judgment of the Supreme Court of the State in accordance with its motion heretofore made and filed in that behalf. The reasons assigned are:

First—Because the bond given in aid of said writ purports to have been executed by the plaint-

iffs in error by J. Warner Mills, their attorney in fact, and no authentication of his power so to act appears in the transcript of the record of said cause.

Second—Because the record fails to show that a Justice of this Court ever gave the plaintiffs in error leave to file the transcript or endorsed upon the transcript a request for the allowance of the writ.

Third—Because the judgment and decision of the Supreme Court of Colorado, to which the writ was directed, was not final; that Court having reversed the judgment of the trial Court with orders to it to proceed further as directed.

Fourth—Because the record discloses that the cause was by the defendant in error removed from the State Court to the United States Circuit Court for the proper district, and by that Court remanded back to the State Court on the application of the defendant in error, as the proper tribunal having jurisdiction thereof.

Fifth—Because the record discloses the existence of no Federal question essential to give this Court jurisdiction of the cause under the 25th Section of the Judiciary Act.

Sixth—Because the plaintiffs in error assumed to present no such question or to assert its existence prior to their petition for a rehearing of the cause, and

Seventh—Because of other matters and things apparent on the face of the record.

1. The bond is executed by the seven plaintiffs in error by "J. Warner Mills, their attorney at law and in fact." He thus assumes to act as the agent

of all the parties jointly. As an attorney at law merely, he of course could not lawfully execute for them a sealed instrument of any description. As attorney in fact he would, of course, have such authority, provided it had been conferred upon him by the joint act of the plaintiffs in error duly executed by them under seal.

McHutt vs. McMahon, 1 Head., (Tenn.) 98.
McCandlish vs. Hopkins, 6 Call., (Va.) 208.
Delius vs. Cawthorne, 2 Dev. L., (N. C.) 90.

Such an instrument may be executed by an agent without authority, and become valid by subsequent ratification; but such ratification can only be by the execution of an instrument of that effect under seal.

Ingraham vs. Edwards, 64 Ill., 526.

A mere filing of the transcript, employment of counsel to present the case, and advancement of clerks, costs for printing, etc., could not be construed to be a ratification of the action of the attorney in fact. The record contains neither a power of attorney to the alleged agent nor any authenticated act of ratification. Hence the bond required by the terms of Section 1000 R. S. U. S.

In the event the defendants in error should prevail on the merits here, and should be obliged to resort to the bond for the collection of their costs, a plea that the plaintiffs in error never executed it or authorized its execution, would be good. No subsequent conduct of theirs short of formal ratification under seal of the action of Mr. Mills could be proven in defeat of such a plea.

II.

The plaintiffs in error, assuming that a writ of error from this Court to the Supreme Court of the State of Colorado was a writ of right, brought the case here upon writ allowed by Chief Justice Helm, of the last named Court, and neither obtained nor sought for the consent of any Justice of this Court to the filing of the transcript. "Writs of error to State Courts have never been allowed as of right. It has always been the practice to submit the record of the State Courts to a Judge of this Court, whose duty has been to ascertain upon examination whether any question cognizable here upon appeal was made or decided in the proper Court of the State, and whether the case upon the face of the record will justify the allowance of the writ."

Twitchell vs. The Commonwealth, 7 Wall, 321.

In the celebrated case of the anarchists Spies vs. Illinois, the transcript was submitted to Justice Harlan, upon petition for writ of error, and there refused because the only Federal question complained of had been properly decided by the State Court. Were the course pursued by the defendants in error here the proper one, counsel for petitioners in that case might have secured their writ by applying to the Justices, or some one of them, of the Supreme Court of the State of Illinois.

In re Kemmler, 136 U. S., 436.

This Court has decided that not even an application for a writ of error will be entertained except when a Justice of the Court, upon consideration of the record, has deemed it proper under

special circumstances to endorse thereon a request that counsel be permitted to proceed that way.

In re Ingalls, 139 U. S., 548.

The transcript shows that a petition for the allowance of the writ was addressed to the Chief Justice of the Supreme Court of Colorado. No bond is prescribed in the order made by him, as required by Section 1000, on the issuance of the citation (fol. 504). The writ bears teste in the name of the Honorable, the Chief Justice of the Supreme Court of the United States, but is silent as to the fact of its allowance from any source.

III.

The 25th Section of the Judiciary Act confers upon this Court appellate jurisdiction over the judgments and decrees of State Courts under certain circumstances and conditions therein enumerated.

Sec. 709, R. S., U. S.

The decree to be reviewed, however, must be final, and unless final, the writ does not lie. In the case at bar, the judgment of the Supreme Court of the State of Colorado reversed the judgment of the Court below. The record of that judgment is as follows: "At this day this cause came on to be heard, as well upon the transcript of proceedings and judgment had in said District Court in and for the County of Hinsdale, as, also, upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the Court, and it appearing to the Court that there is manifest error in the proceedings and judgment aforesaid of the said

District Court, *It is therefore considered and adjudged by the Court that the judgment aforesaid of said District Court be and the same is hereby reversed, annulled and altogether held for naught*, and that this cause be remanded to said District Court, with directions to said District Court to enter judgment in accordance with the view expressed by this Court in its opinion filed herein. It is further considered and adjudged by the Court that the said appellants do have and recover of and from said appellee their costs in this behalf expended, to be taxed, and that they have execution therefor. And let the opinion of the Court filed herein be recorded." (Fol. 484, printed transcript.)

This form of reversal is absolute, notwithstanding the fact that it contains a direction to the lower Court to enter judgment in the case in accordance with the opinion of the Supreme Court. Costs are given to appellants and a writ of execution awarded to them for their collection. It is manifest that this cannot be a final judgment. The final judgment in the case was doubtless rendered by the District Court of Hinsdale County in accordance with the mandate of the Supreme Court, and the costs were paid to the appellants by the appellee, as the latter was required to do under the decision.

It has been frequently decided that no writ of error from this Court to a State Court, or an appeal from a State Court to this Court would be entertained unless the judgment to be reviewed was absolutely final. Thus, a judgment ordering a new trial, or any other further proceedings cannot be reviewed by this Court.

McComb vs. Commissioners, 91 U. S., 1.
Bostwick vs. Brinkerhoff, 106 U. S., 3.

And it has been frequently held that a judgment reversed and remanded for any further proceedings below is not final in its character.

Brown vs. Bank, 4 Howard, 465.
Heffer vs. Dunlap, 5 Howard, 51.
Tracy vs. Holcombe, 24 Howard, 426.
Moore vs. Robbins, 18 Wallace, 588.
Baker vs. White, 92 U. S., 176.
Davis vs. Crouch, 94 U. S. 514.
Zeller vs. Switzer, 91 U. S., 487.
Johnson vs. Kieth, 117 U. S., 199.
Smith vs. Adams, 130 U. S., 167.

The judgment of the highest Court of law of the State is not a final judgment within the 25th Section of the Judiciary Act of 1789, if the suit has been remanded to the inferior State Court for further proceedings consistent with the judgment of the highest Court.

Winne vs. Johnson, 12 Wheaton, 135.
Mayberry vs. Thompson, 5 Howard, 121.
Holcomb vs. McCusick, 20 Howard, 552.
Rankin vs. Tennessee, 11 Wallace, 380.
St. Clair vs. Livingstone, 18 Wallace, 628.
Parcells vs. Johnson, 20 Wallace, 653.

Although the merits of the case have been substantially decided, while anything, though formal, remains to be done, this Court cannot pass upon the subject.

Insurance Co. vs. Adams, 9 Peters, 571.

A judgment cannot be regarded as final for the purposes of jurisdiction until entered in the Court from which execution can issue.

Green vs. Van Buskirk, 3 Wallace, 448.

No execution or writ of restitution against the plaintiffs in error could have issued in behalf of the defendant in error from the Supreme Court of Colorado, under the judgment which is sought to be reviewed here. And the use of the term "final decision," in Section 1911 of the Revised Statutes, does not enlarge the scope of the jurisdiction of this Court. It is only a substitute for the words "final judgments and decrees," in Section 709, and means the same thing.

Crawford vs. Haller, 111 U. S., 796.

A judgment of the lower appellate Court which reverses the Court of original jurisdiction and remands the cause to it for further proceedings, is not a final judgment.

Smith vs. Adams, 130 U. S. 167.

Dist. of Columbia vs. McBlair, 124 U. S. 320.

The plaintiffs in error, by saving formal exception to the action of the Court of original jurisdiction below in entering a judgment against them in accordance with the directions of the Supreme Court would be entitled to an appeal or writ of error from such judgment to the Supreme Court. This might not avail anything; but the right to a further review of such proceedings is conclusive of the proposition that the judgment sought to be reviewed in this instance is not final. Hence, the writ of error should be dismissed.

IV.

When the cause was originally brought in the District Court of the State of Colorado for Hins-

dale County and service obtained, the defendant in error caused the same to be removed to the United States Circuit Court for the District of Colorado, sitting at Del Norte, under the Removal Act of 1875. The plaintiffs in error resisted, in the State Court, the application to remove the suit (fol. 42). The State Court made an order removing the cause, after which the plaintiffs in error, in the United States Court, made a motion to remand it back to the State Court; which motion was sustained (fol. 44).

It is true that the reason given by the United Stated Court for the order of remand was the insufficiency of the bond filed by the defendant in error. The reason is immaterial. The important feature of the proceeding is that the jurisdiction of the Federal Court was denied and successfully resisted in the first instance by the present plaintiffs in error; it was their act and effort which kept the case in the State Courts notwithstanding the belief of the defendant in error that it was properly cognizable by the Federal Tribunals and should, by them, be ultimately determined.

The plaintiffs in error, having gone to the Court of last resort of the State, which rendered a decision not in harmony with their views of what the law and the facts required, now come knocking at the doors of this Court, and, under the pretense that some right or title claimed by them under the Federal law has been denied, assume that this Court has jurisdiction of the case. We contend that they are estopped, by their former conduct, to invoke the jurisdiction of this Court at the present time. Having successfully protested against Federal

jurisdiction at the outset, they cannot now effect an exchange of tribunals because, under their construction of the decision of the Supreme Court of the State, they have been defeated. It is a familiar principal, needing no citation of authority, that he who selects his tribunal and is there defeated, cannot afterwards select some other in the hope that he may there be more fortunate.

V.

There is nothing in the transcript of the record in this cause which discloses the existence of any Federal question, which, under the 25th Section of the Judiciary Act is essential to endow this Court with jurisdiction of the cause. With that section this Court is familiar, and we shall not, therefore, incorporate it in our brief.

The suit was orginally brought by the defendant in error, as the owner of the Annie lode location in Hinsdale County, Colorado, against the plaintiffs in error, as the owners or claimants of the Monitor lode location, which embraced a portion of the same territory as that enclosed within the Annie boundaries, and from which the defendant in error had been ejected. The pleadings are extremely simple. They consist of a short statement of the facts constituting the plaintiffs' cause of action and a denial thereof by the defendants. The latter do not even plead their own title affirmatively. Under the authority given to the State legislatures by congressional law, the General Assembly of the State of Colorado limited the width of mining claims to 150 feet in width on each side of the center of the lode or vein at the surface.

Sec. 3149, Mills' Ann. Statutes of Colo.

The Supreme Court of the State of Colorado in the case of Patterson vs. Hitchcock, 3 Colo., 533, has held that if a located lode terminates at any point within the location, or departs at any point from the side lines, the location beyond such point and to that extent is defeasible, if not void, before patent. The defendant in error sought to and did show that the Monitor lode departed from its side lines and that the Annie lode was nowhere within the distance of 150 feet from the center of the Monitor lode at the surface (see plat, Exhibit "Z," transcript). A vast amount of testimony was introduced by the contending parties relative to the strike or direction of the vein, and the decision involved a construction of the State statutes concerning the acquisition of mining property and touching but incidentally the Federal Statutes upon the subject. No construction of any Federal Statute was attempted or became necessary for the determination of the rights of the parties, either in the trial Court or the Court of review. References were made to the Federal law in some of instructions given to the jury; but no contention was made prior to the decision of the Supreme Court that such references involved any construction of it whatever. A careful consideration of the errors assigned in the Supreme Court of the State, as well as those assigned in this Court, fails to indicate the existence of a single Federal question.

Assignment number four in this Court, complains that the burden of proof was shifted upon the plaintiffs in error, contrary to the Federal Mining Statutes. There is no mining statute, Federal

or State, which has anything to do with determining upon whose shoulders is imposed the burden of proof.

Assignment number eight contains an instruction relating to the laws of Congress and of the State, but with the exception of the opening sentence of the instruction, there is no allusion whatever to any Federal law.

Assignment number eleven relates to a discovery shaft only, and discovery shafts are provided for not in the Federal but in the State Mining Statutes.

The other instructions complained of principally relate to questions of physical fact and to State statutes independent of any Federal regulation. Hence, we say that no Federal question is involved in the record. It may be, and probably is true, that all controversies concerning mining claims on the Federal domain involve a consideration of the Federal statutes to a greater or less degree. That, however, is not sufficient to present a Federal question in the sense that this term is used when applied to the right of this Court to review the decision of a State Court.

"The validity of a statute is not drawn in question every time a right claimed under such statute is controverted, nor is the validity of an authority drawn in question every time an act done by such authority is disputed."

Cook Co. vs. Calumet Co., 138 U. S., 635.

And since the validity of the statutes of the United States was not drawn in question in this controversy, it is difficult to determine how any Federal question can arise or be said to exist so as

to endow this Court with supervisory jurisdiction of the case. But we may concede for the sake of argument that a Federal question may be somewhere found sufficient in magnitude and character to endow this Court with jurisdiction. This will not avail the plaintiffs in error, unless they can show that the case was determined adversely to their rights and claims *upon that point*. The decision of the Court below was manifestly based upon a consideration of the alleged erroneous character of Instruction No. 13, because it assumed the existence of things which were controverted by the proofs offered. The opinion of the Court was to the effect that the assumption of fact under that instruction only went to the extent to which such facts were admitted by the proofs; and hence, was not obnoxious to the general proposition that an instruction which assumes certain facts which were controverted to be true is erroneous. It has been frequently decided by this Court that where it appears that a decision below was adverse to the plaintiff in error upon two or more independent grounds, one of which is not a Federal question, the Supreme Court will affirm the judgment.

Murdock vs. Memphis, 20 Wallace, 590.
Adams vs. B. &. M. R. R. Co., 112 U. S., 123.
DeSaussure vs. Gaillard, 127 U. S., 216.
Hopkins vs. McClure, 133 U. S., 318.
Hale vs. Acres, 132 U. S., 554.
Blunt vs. Walker, 134 U. S. 607.
Johnson vs. Risk, 137 U. S. 300.
Beaupres vs. Noyes, 138 U. S., 397.
Hammond vs. Johnson, 142 U. S., 173.

Haley vs. Breeze, 144 U. S., 130.
Missouri vs. Harris, 144 U. S., 210.

VI.

The plaintiffs in error did not pretend to present any Federal question, or to assert the existence of such a question in this record prior to their petition for a rehearing of the cause. That petition appears *in extenso* in the transcipt (fol. 497 and following). After a decision had been rendered adverse, as they claim, to their interest and their right, they assumed to call the attention of the Court to certain Federal phases of the controversy,and to complain that their rights under the laws of the United States and their title, as claimed, by virtue of such laws, had been erroneously denied. We defy counsel for the plaintiffs in error to show wherein the record discloses that such a question was touched upon, called to the notice of the Supreme Court or claimed to exist prior to the motion for a rehearing. This Court has decided that if the question is not raised until the making of such a motion, no writ of error will lie.

Texas Pac. Co. vs. Southern Pac. Co., 137 U. S., 48.
Butler vs. Gage, 138 U. S., 52.
Winona R. R. vs. Plainview, 143 U. S., 391.

A mention of a Federal question in the petition for the writ of error is insufficient to give the Supreme Court jurisdiction.

Lieper vs. Texas, 139 U. S., 462.
Trippe vs. Santa Rosa R. R. Co., 147 U. S., 126.

In the case of Armstrong vs. Athens County,

16 Peters, 281, this Court has decided that in records like this, the question giving this Court jurisdiction must be shown, *first*, either by express averment or necessary intendment in the pleadings in the cause, or *second*, by direction given by the Court and stated in the exception, or *third*, under the laws of Louisiana by a statement of facts which is usually made in such cases by the Court, or *fourth*, it must be entered on the record of the proceedings in the appellate Court, in cases where the record shows that such a point may have arisen and been decided, that it was, in fact, raised and decided, and this entry must appear to have been made by the order of the Court, or the presiding Judge by order of the Court, and certified by the Clerk as a part of the record in the State Court, or *fifth*, in proceedings in equity it may be stated in the body of the final decree of the State Court, from which the appeal is taken to this Court, or *sixth*, it must appear from the record that the question was necessarily involved in the decision, and the State Court could not have given the judgment or decree which they passed on, without deciding it. This Court will not resort to forced inferences and conjectural reasoning, or to even probable suppositions of the points raised and decided in order to sustain jurisdiction.

Ocean Ins. Co. vs. Polley, 13 Peters, 157.

The record must show affirmatively, or by fair implication, that some Federal question was involved.

Brown vs. Colorado, 106 U. S., 95.
Bouton vs. Bank, 104 U. S., 427.
R. R. Co. vs. R. R. Co., 19 Howard, 378.

We are quite willing to hazard this motion upon the ground herein alleged.

From a consideration of all the matters and things herein involved, we respectfully submit to this Honorable Court that the motion to dismiss this writ and to affirm the decree of the Court below should be sustained.

C. S. THOMAS,
W. H. BRYANT,
Attorneys for Defendant in Error.

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1892.

A. R. BUSHNELL, JOHN G. CLARK, ADOLPH NATHAN, JOSEPH NATHAN, JOHN SCHREINER, FRED J. MILLER AND A. A. BOCK,
Plaintiffs in Error,
vs.
THE CROOKE MINING & SMELTING COMPANY,
Defendant in Error.

Term No. 195.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

The defendant in error now comes and moves this Honorable Court to dismiss the said writ of error and to affirm the judgment and decree of the said Supreme Court of the State of Colorado.

And the said defendant in error assigns the following reasons for the making of said motion:

First—Because the bond given in aid of said writ purports to have been executed by the plaintiff in error by J. Warner Mills, their attorney in fact, and no authentication of his power so to act appears in the transcript of the record of said cause.

Second—Because the record fails to show that a Justice of the Supreme Court has ever given the plaintiff in error leave to file the transcript, or has ever endorsed upon the transcript a request for the allowance of the writ.

Third—Because the judgment and decision of the Supreme Court of the State of Colorado, to which the writ of error was directed, was not final; that Court having reversed the judgment of the trial Court with orders to it to proceed further as directed.

Fourth—Because it appears from the record that the cause was upon petition and before that transferred by the defendant in error to the United States Circuit Court for the proper district and by that Court remanded at the request of the plaintiffs in error back to the State Court as the only tribunal having jurisdiction thereof.

Fifth—Because the record shows the existence of no Federal questions essential to give this Court jurisdiction of the cause under the 25th Section of the Judiciary Act or any amendment thereof.

Sixth—Because the plaintiffs in error did not assume to present any such question or to assert its existence prior to their petition for a rehearing of the cause.

Seventh—Because of other matters and things

apparent on the face of the transcript of the record and disclosing the absence of any right or jurisdiction of this Court to proceed therein.

WHEREFORE the defendants in error pray that the said writ of error be dismissed and the judgment below affirmed at the cost of the plaintiffs in error to be taxed.

C. S. THOMAS,
W. H. BRYANT,
Attorneys for Defendant in Error.